LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 14 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

Term, 1967
No. 1066

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION et al.,
Petitioners

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM A. GOICHMAN
Assistant Counsel
EDWARD MUNCE
Assistant Counsel
JOSEPH C. BRUNO
Chief Counsel
Attorneys for Petitioners

127 N. Office Building
Harrisburg, Pennsylvania.

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.



INDEX

	PAGE
Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit	1
Opinions Below	2
Jurisdiction	4
Questions Presented	5
Statutes Involved	6
Statement of the Case	8
Petitioners' Contention	10
Reasons for Granting the Writ:	
I. This case presents an important question of Federal Law involving as it does, the constitutionality of the Transportation Act of 1958, Section 13a(1), as applied to the particular facts of the case, which should be settled by this Court	11
II. The Order of the P.U.C. requiring the Railroad to maintain service within the state should have been accorded full faith and credit, or, at the least, comity, should have been applied	21
III. The District Court should have declined jurisdiction on the basis of the doctrine of comity	23
Conclusion	28
Appendix I. Opinion of the Court filed December 6, 1966	29
Order	45
Judgment	46

Appendix II. Opinion of the United States District Court for the Middle District of Pennsylvania 47

Order 55

Appendix III. Decision of the United States Supreme Court (86 S. Ct. 423) 56

Order 57

Appendix IV. Opinion of the District Court 58

Order 68

Appendix V. Order dated August 7, 1961 69

Appendix VI. Pennsylvania Public Utility Commission, Application Docket No. 87818, Commission Order of July 9, 1962 89

Appendix VII. Notice dated February 8, 1962, Interstate Commerce Commission 113

Appendix VIII. Order dated March 29, 1962, Interstate Commerce Commission 114

Appendix IX. New Section 13a of Interstate Commerce Act 115

Appendix X. Act of Congress, 28 U.S.C. §1738 120

TABLE OF CITATIONS

CASES:

Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951) 13, 23, 24, 25

B. & O. S. W. R.R. Co. v. Settle, 260 U.S. 166 .. 18

Banta v. U. S., 355 U.S. 34, affirmed 152 F. Supp. 59 (D. N.J. 1957) 13

Broderick v. Rosner, 294 U.S. 629 22

Burford v. Sun Oil Co., 319 U.S. 315 25,26

Chicago, Milwaukee, St. Paul, R. Co. v. State of Ill., 355 U.S. 305 14

Colorado v. U. S., 271 U.S. 153 ..... 12, 16, 18
Davis v. Davis, 305 U.S. 32 22
Durfee v. Duke, 375 U.S. 106 ..... 21, 22
Erie Railroad Co. v. State, 51 N.J. Super. 61, 143 A. 2d 224 (1958) 21
Florida v. U. S., 282 U.S. 194, 211 ..... 12, 14
General Telephone Company of Southwest v. Robinson, 132 F. Supp. 39 (Ark. D.C. 1955) 27
Georgia v. Chattanooga, 264 U.S. 472 25
Gulf, M. & O. R. Co. v. Louisiana Public Service Commission, 120 F. Supp. 250 (La. D.C. 1954) 13, 27
Gulf Oil Corporation v. Corporation Commission of Oklahoma, 147 F. Supp. 640 (Okla. D.C. 1956) 27
Houston, E. & W. T. R. Co. vs. U. S. ("Shreveport"), 234 U.S. 342 ..... 13, 15
Kolb v. Feuerstein, 308 U.S. 433 22
Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 443 22
Martin v. Creasey, 360 U.S. 219 26
Missouri Pacific Railway Co. v. Kansas ex rel. Taylor, 216 U.S. 262 13
New Jersey v. New York, S. & W. R. Co., 372 U.S. 1, 5 13
New Jersey v. U. S., 359 U.S. 27, affirmed 168 F. Supp. 324 (D.C. N.J. 1958) 8, 9, 20
New York Central & H. R.R. Co. v. Hudson County, 227 U.S. 248 (1913) 20
New York v. U. S., 257 U.S. 591 14
North Carolina v. U. S., 325 U.S. 507 ..... 14, 15
Palmer v. Com. of Mass., 308 U.S. 79 13

Penna. R.R. Co. v. Sharfsin, 240 F. Supp. 233 (M.D. Pa. 1965) 2
Polish Alliance v. Labor Board, 322 U.S. 643, 649 21
P.S.C. of Utah v. U. S., 356 U.S. 421 ....11, 14, 15, 19
P.S.C. of Utah v. Wycoff Co., Inc., 344 U.S. 237 26
Schechter Corp. v. U. S., 295 U.S. 495 28
Simpson v. Shepard, 230 U.S. 352 13
Southern Ry. Co. v. So. Car. P.S.C., 31 F. Supp. 707 13
Texas and Eastern Texas R.R. Co., 258 U.S. 204 (1922) 9, 17, 18, 19
U. S. v. U. S. F. & G. Co., 309 U.S. 506 22
West Coast Exploration Co. v. McKay, 213 F. 2d 582 (D.C. Cir. 1954), cert. denied, 347 U.S. 989 22
Yonkers v. U. S., 320 U.S. 685, 690 16

STATUTES:

Title 28, U.S.C. Section 1254(1) 4
Transportation Act of 1958:
Title 49 U.S.C., Section 13a(1) 5, 11, 15, 19
Title 49, U.S.C., Sections 13a(1) and 13a(2) 6
Title 49, U.S.C., Sections 1(18) and 1(19) .. 19, 20, 28
Full Faith and Credit Act of May 26, 1790, Title 28 U.S.C. 1738, 1739 6
Public Utility Law of May 28, 1937, P. L. 1053, Sections 1101, 1109 and 1412, 66 P.S. Sections 1431, 1439, 1442 ..... 6, 7
Pennsylvania Public Utility Law, Sec. 1112 (66 Purdon's Penna. Statutes Annotated, Section 1442) 21
Pennsylvania Public Utility Law (66 Purdon's Penna. Statutes Annotated, Sections 1171 and 1173) 22

TEXT:

Black's Law Dictionary 23

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1967

No.

The Pennsylvania Public Utility Commission et al.,

Petitioners

v.

The Pennsylvania Railroad Company,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, by their attorneys, pray that a writ of certiorari issue to review the judgment entered in this case on December 6, 1966, by the United States Court of Appeals for the Third Circuit, affirming the judgment in favor of respondent, The Pennsylvania Railroad Company, rendered February 9, 1966, by the United States District Court for the Middle District of Pennsylvania.

OPINIONS BELOW

The opinion and orders of the Court of Appeals rendered December 6, 1966 are reported at 369 F. 2d 276 and attached hereto as Appendix I. The opinion and order of the District Court (February 9, 1966) is attached hereto as Appendix II, reported previously as the opinion of a three-judge District Court in *Penna. R.R. Co. v. Sharfsin,* 240 F. Supp. 233 (M.D. Pa. 1965). The Pennsylvania Public Utility Commission ("P.U.C.") previously filed an appeal with the United States Supreme Court which, on December 13, 1965, vacated the judgment of the three-judge District Court and remanded the case to the District Court for the entry of a fresh decree from which a timely appeal could be taken to the Court of Appeals: 382 U.S. 281, 86 S. Ct. 423, 15 L. Ed. 2d 324. This opinion is attached hereto as Appendix III.

The opinion and order of the District Court (Follmer, J.,) dated March 20, 1963, denying the motion of the P.U.C. to dismiss the suit "in the present posture of the case," is attached hereto as Appendix IV. This opinion is reported at 215 F. Supp. 493.

The original proceedings before the P.U.C. culminating in the order of August 7, 1961, denying respondent's application is attached hereto as Appendix V. The opinion and order of the P.U.C. dated July 9, 1962, making absolute its subsequent rule to

show cause why respondent should not maintain service as required by the order of August 7, 1961, is also attached hereto as Appendix VI, and reported in P.U.C. reports: 40 Pa. P.U.C. 96 (1962). The notice of the Interstate Commerce Commission ("I.C.C."), dated February 8, 1962, is attached hereto as Appendix VII. The subsequent notice issued by the I.C.C. on March 23, 1962, on request for reconsideration, is attached hereto as Appendix VIII.

JURISDICTION

The judgment of the Court of Appeals was entered on December 6, 1966. The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

(1) Whether the Transportation Act of 1958 (Title 49, U.S.C., Section 13a(1)), is constitutional insofar as it declares that a valid State order over intrastate passenger train service is null and void where the railroad in question which was subject to said State order, sends a mere notice to the Interstate Commerce Commission of its intention to discontinue such passenger service within the State, without any adjudication, any record or any findings of any kind being made by the Interstate Commerce Commission?

(2) Should the District Court have dismissed the case because of the doctrine of Full Faith and Credit or Comity?

STATUTES INVOLVED

The Pertinent provisions of the Transportation Act of 1958, Title 49 U.S.C., §§13a(1) and 13a(2); Full Faith and Credit Act of May 26, 1790, Title 28 U.S.C. 1738, 1739. These are printed as Appendices IX and X.

Pennsylvania Public Utility Law of May 28, 1937, P. L. 1053, Sections 1101, 1109 and 1112, 66 P.S. §§ 1431, 1439, 1442:

> "Section 1101 (66 P.S. §1431). *Appeals to Courts; Jurisdiction and Practice*—(a) Within thirty days after the service of any order by the commission, unless an application for a rehearing may be pending, and then within thirty days after the service of the order refusing such application, or the service of an order modifying, amending, rescinding, or affirming the original order, any party to the proceedings affected thereby may appeal therefrom to the Superior Court. **Such court is hereby clothed with exclusive jurisdiction throughout the Commonwealth** for the purpose of hearing and determining any or all such appeals: . . ."

> "Section 1109 (66 P.S. §1439). *Appeals to Supreme Court*—Within thirty days after the entry of any final judgment, order, or decree of the Superior Court, any party to the record, aggrieved thereby, may appeal therefrom to the Supreme

Court, if the jurisdiction of the Superior Court is in issue, or if the case involves the construction or application of the Constitution of the United States **or of any statute or treaty of the United States**, or if the case involves the construction or application of the Constitution of Pennsylvania, or if the appeal to the Supreme Court be especially allowed by the Superior Court itself, or by any one justice of the Supreme Court. Such appeal shall be taken and prosecuted in the same manner, and with the same effect, as is provided in other cases of appeal from the Superior Court to the Supreme Court."

"Section 1112 (66 P.S. §1442). *Effect of Commission Action*—Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act, the same shall be prima facie evidence of the facts found, **and shall remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal to the Superior Court taken as provided in this act.**"

STATEMENT OF THE CASE

The facts are adequately set forth in the opinions of the Court of Appeals and District Court. One of the difficulties petitioners find in making their argument is the problem of semantics. For purposes of clarity, petitioners propose the following: An "interstate train" is a train carrying a passenger from one State to another State. An "intrastate" train is a train carrying a passenger from a point in one State to a point in the same State. A "mixed" train is a train carrying two passengers, one going from one State to another, and one going only between points in the same State.

The trains in this case (train Nos. 638 and 645) travelled between Harrisburg, Pennsylvania, and Hagerstown, Maryland, making three intermediate stops in Pennsylvania at Carlisle, Chambersburg and Greencastle, and no intermediate stop in Maryland before Hagerstown. These trains, under the definitions above, would be mixed trains, carrying passengers going only between points in Pennsylvania, and also passengers going only between points in different States.

As to passengers going between States, this is purely interstate commerce, over which Congress has exclusive and plenary power. Whether Congress permitted passenger train service to be discontinued without any record would be immaterial. *New Jersey v. U.S.*, 359 U.S. 27, affirmed, 168 F. Supp. 324

(D.C. N.J. 1958); *Texas v. Eastern Texas R.R. Co.*, 258 U.S. 204 (1922) (holding, State could not attack discontinuance of interstate portion of line, and order of I.C.C. was construed to apply only to that aspect).

PETITIONERS' CONTENTION

As to passengers going between points within the same State, it is our contention that before Congress can decree the elimination of this service, there must be some record, either before Congress or its legislative body, that would warrant the elimination of this service.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW INVOLVING AS IT DOES, THE CONSTITUTIONALITY OF THE TRANSPORTATION ACT OF 1958, §13a(1), AS APPLIED TO THE PARTICULAR FACTS OF THIS CASE, WHICH SHOULD BE SETTLED BY THIS COURT

As was said in *P.S.C. of Utah v. U.S.*, 356 U.S. 421, "This appeal presents another clash between state and federal authority in the regulation of intrastate commerce."

(A) Discontinuance of a "Mixed Train" Requires a Record

Section 13a(1), we say, is constitutional so far as it applies to an interstate train. But it is not constitutional so far as it applies to the intrastate service in a mixed train. E.g., Customer A in Harrisburg who wants to go to Hagerstown, Md., can be told that the Railroad has discontinued service from Harrisburg to Hagerstown without notice to him or his State, or without any hearing or findings relating thereto. But Customer B who goes from Harris-

burg to Greencastle, Pa., is strictly an intrastate customer going on an intrastate trip. The railroad can cease its interstate commerce journey without ceasing its intrastate commerce. Customer B, cannot, and should not be told, that he will no longer be carried from Harrisburg, Pa., to Greencastle, Pa., without notice to him or his State and without some kind of record before Congress or its body supporting the elimination of state control over this type of transportation.

(B) Challenge Is Not to "Power" But Appropriateness of Its Exercise

---

We do not argue Congress' power to control this type of transportation. *Colorado v. U.S.*, 271 U.S. 153. In the latter case there was a hearing, notice to the State, and findings, which were appropriate for the exercise of Congress' power over the intrastate aspects, as well. In the instant case, there was no notice, no hearing or any findings made. Hence, *Colorado* does not apply.

As was stated in *Florida v. U.S.*, 282 U.S. 194, 211:

> "The question in the present cases, then, is not one of **Authority**, but of its **Appropriate Exercise.** The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of

the federal power must clearly appear. Illinois Central R.R. Co. v. State P.U.C., supra. The Commission has no general authority to regulate intrastate rates. . . ."

(C) State Domain

That part of a mixed train involving service within the State has always been regarded as being within State domain. *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341; *New Jersey v. New York, S. & W. R. Co.*, 372 U.S. 1, 5; *Palmer v. Com. of Mass.*, 308 U.S. 79; *Missouri Pacific Railway Co. v. Kansas ex rel. Taylor*, 216 U.S. 262; *Banta v. U.S.*, 355 U.S. 34, affirming 152 F. Supp. 59 (D.N.J. 1957); *Gulf, M. & O. R. Co. v. Louisiana P.S.C.*, 120 F. Supp. 250; *Southern Ry. Co. v. So. Car. P.S.C.*, 31 F. Supp. 707. While the foregoing cases dealt with service, the same rule applies also to rates: *Simpson v. Shepard*, 230 U.S. 352.

(D) Cases in Rate Field

Congress has never before passed an act similar to the one in question. If it ever attempted to wipe out State rates on mixed trains without a record, a host of authorities would come to the defense of the aggrieved State based upon its constitutional rights: such as, *Houston, E. & W. T. R. Co. vs. U.S. ("Shreve-*

port''), 234 U.S. 342; *New York v. U.S.*, 257 U.S. 591; *Florida v. U.S.*, 282 U.S. 194; *North Carolina v. U.S.*, 325 U.S. 507; *Chicago, Milwaukee, St. Paul, K. Co. v. State of Ill.*, 355 U.S. 305; *P.S.C. of Utah v. U.S.*, 356 U.S. 421, 425.

In the last case, (*P.S.C. of Utah v. U.S.*) the Court noted that "intrastate and interstate traffic was handled by the same crews and intermingled in the same movement" 356 U.S. 427. There were mixed trains involved in that case. Yet, the Interstate Commerce Commission was not permitted to eradicate the state rates except where the "Proof of such [i.e. prejudice or undue burden] must meet 'a high standard of certainty' [cases cited] before a state rate can be nullified, the justification for the exercise of federal power must 'clearly appear.' [citations omitted]." In the instant case, there are no findings at all! There is no proof of anything!

The Court in reversing the Court below in the Utah case especially noted: "an absence in the findings of any indication that the Commission concerned itself with the revenues derived from, or the conditions incident to, intrastate passenger operations" 356 U.S. 428. The Court also noted another absence: "A fair picture of the intrastate operation, and whether the intrastate traffic unduly discriminates against interstate traffic, is not shown * * * Id." In the instant case, the Railroad may be losing money on service from points in Pennsylvania to Hagerstown, Maryland, but, the picture may be different if the intrastate traffic is viewed separately! The company may show a profit in operations between

Harrisburg and points in Pennsylvania. In the absence of a record, or findings, this cannot be known. Yet, without it being known, and irrespective of what the picture may be, Congress by 13a(1) says that the State order over the intrastate aspects is eliminated. No record! No findings!

In the rate field, it is clear that if Congress attempted to apply a similar procedure to rates as obtains under 13a (1), such a measure could not pass constitutional muster.

In such a case, your Honorable Court has said:

> "Intrastate transportation is primarily the concern of the State. Federal power exists in this area only when * * *. Proof of such must meet a 'high standard of certainty,' [cases]; before a state rate can be nullified, the justification for the exercise of federal power must 'clearly appear.' [Cases]." 356 U.S. 425.

In *N. C. v. U. S.*, 325 U.S. 507, 511, following the same line, the court said:

> "The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intrastate rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission."

These and many other cases trace their lineage to *Houston, E & W. T. R. Co. v. U. S. ("Shreveport")*, 234 U.S. 342, the father of all cases concerning federal and state powers.

Therefore, if any such attempt were made in the rate field for a 13a(1) type of measure, it must certainly be struck down as unconstitutional.

(E) Service Field

In the 19th Century, rates were of primary concern. But then service came to the fore in litigation. This Court likened federal power over service to Congress' power over rates. For example, in *Colorado v. U.S.*, 271 U.S. 163, the Court said:

> "The jurisdiction exercised by the Commission in these cases [i.e. abandonment cases] is in essence that which was invoked in the Shreveport case, 234 U.S. 342."

In *Yonkers v. U. S.*, 320 U.S. 685, 690, the Court said:

> "The power of the Commission to control the abandonment of intrastate branches of interstate carriers **stems** from the Power of Congress to protect interstate commerce from undue burdens or discriminations. [cases cited.]"

The Court also said, of pertinence [320 U.S. 690]:

> "In the application of the doctrine of the Shreveport case, this Court has required the Commission to show meticulous respect for the interests of the states. It has insisted on a 'suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must

clearly appear.' Florida v. United States, 282 U.S. 194, 211-212. * * *

"Here as in the Florida case the problem is whether the courts should supply the requisite jurisdictional findings which the Commission did not make and to which it even failed to make any reference."

No displacement of a State prescribed rate on a mixed train can take place without a record. We think the cases similarly require that no displacement of a state prescribed service on a mixed train can take place without a similar record. The Act of Congress in question is *sui generis* and without legal support or justification.

(F) Texas v. Eastern Texas R.R. Co. Applies

The closest case to the instant one is **Texas v. Eastern Texas R.R. Co.**, 258 U.S. 204. With all due deference to the Learned Court of Appeals, it is submitted that that Court misconstrues the holding. The opinion in the *Texas* case would have been the same whether the line went from a point in one state to a point in another state! The Supreme Court in the *Texas* case still would have construed the I.C.C. certificate as applying only to the interstate aspects of the mixed train, because there was no adequate record as to the intrastate aspects. Whether or not the railroad crossed state lines was **not** the decisive factor in the *Texas* case, but rather, it was the lack of a record as to the intrastate aspects affecting interstate commerce.

Congress' power over interstate commerce is not more, nor less, as to a railroad engaged in interstate commerce because its line is located wholly within one state. Interstate commerce takes its measure from the goods and people transported on its instrumentalities: *B. & O. S. W. R.R. Co. v. Settle,* 260 U.S. 166. A railroad may be wholly engaged in interstate commerce even though its line is entirely within one state—if it transports only goods coming in from other carriers originating without the state and moving on a continuous journey. *Settle* case, supra.

The important feature, therefore, of the *Texas* case was not that the line was located within a state, but that there was no supporting record as to the intrastate service affecting interstate commerce. When the Court of Appeals speaks of what Congress may or may not do, in the abstract, we cannot disagree. But what it may or may not do with or without an appropriate record is an entirely different thing!

The difference between the *Texas* case and the *Colorado* case is merely one of a record. The record in the *Colorado* case supported the decision that continuation of intrastate service after the interstate service was abandoned would still burden interstate commerce. The record did not, and could not, support such a conclusion in the *Texas* case. **Similarly, in the case at bar, there is no record at all!**

If State orders over intrastate commerce viz-a-viz mixed trains can be eliminated **without records,** then all state orders both as to service and rates on a mixed train are in jeopardy and the bedrock principles and doctrines that have come down through the years, will have gone up in smoke.

The Court of Appeals said: "Nor is it permissible here to 'convert' these trains into intrastate trains by viewing them apart from and after termination of their interstate operation." (p. 42, infra). And yet, this is exactly what your Honorable Court did in the *Texas* case. The interstate operation was viewed separately from the intrastate operation, although both operations were on the same line over the same points. In the *Utah* case (356 U.S. 427), intrastate and interstate traffic were intermingled in the same movement. There is no reason in law or in logic why the two aspects cannot be as separate in law as they are truly in fact. . . . .

The Court of Appeals notes the disruption that would take place if each state through which the train runs had the right to continue service after the pure interstate service were discontinued. The same argument applies equally to any abandonment proceeding by a railroad. Nevertheless, Congress saw fit under 1 (18) to provide a record. The answer provided by Congress in abandonment cases (Title 49, U.S.C. Section 1(18)); namely, the provision for a record, should have been made here. If 13a (1) is constitutional, then 1 (18) could be amended to operate without a record also. This would be thrusting us into a system of an arbitrary method of overriding State orders. It is significant to note that Congress in §1(19) specifically provides, "Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State . . . with the right to be heard as hereinafter provided with respect to the hearing of complaints . . ."

The right of an interstate railroad to abandon a line is just as vital, if not more so, than the right to discontinue any line. Yet in the first case, Congress did not think it onerous or improper to provide for a hearing and a proper record. However, in the case at bar this is completely dispensed with. The difference, of course, does not lie in the differences between the actions but rather in the political climates existing at the time of passage of the various measures. State sovereignty and state rights cannot be made to depend upon the attitudes of the day toward the State or toward the railroad!

(G) New Jersey Case Inapplicable

The New Jersey case (*N. J. v. U. S.*, 168 F. Supp. 324, aff'd 359 U.S. 27) is obviously inapplicable since in that case there was an interstate instrumentality **with no intrastate service. This type of operation** never involved a matter in State domain: *New York Central & H. R.R. Co. v. Hudson County*, 227 U.S. 248 (1913); *Erie Railroad Co. v. State*, 51 N.J. Super. 61, 143 A. 2d 224 (1958). "Constitutional questions that look alike often are altogether different can call for different answers because they bring into play different provisions of the Constitution or different exertions of power under it." *Polish Alliance v. Labor Board*, 322 U.S. 643, 649.

In conclusion, the Act of Congress under 13a(1) which renders State orders of no significance, is unconstitutional, so long as it does so without a record or proper basis being laid therefor. Section 1

(18) involving abandonment proceedings, by contrast, requires that notice be given to the state involved, a full hearing be held, and a right to be heard is afforded to the applicable state and a proper record is made. These provisions, required in abandonment proceedings, have never been regarded as being the cause of frustrating national policies. It is hard to see how similar provisions in 13a(1) could be the source of such frustration. The rights of the states are the same under 13a(1) as they are under 1(18). We only ask that the states be accorded the same rights, rights that we claim are vouchsafed to them under the Constitution.

II.

THE ORDER OF THE P.U.C. REQUIRING THE RAILROAD TO MAINTAIN SERVICE WITHIN THE STATE SHOULD HAVE BEEN ACCORDED FULL FAITH AND CREDIT

The constitutional command of full faith and credit, as implemented by Congress, requires that "judicial proceedings * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such States * * * from which they are taken." *Durfee v. Duke,* 375 U.S. 106, 109.

The Public Utility Commission order of July 9, 1962, requiring service was never appealed by the Railroad. It became a final and binding order under the Pennsylvania Public Utility Law, Sec. 1112 (66 Purdon's Penna. Statutes Annotated, §1442.)

An order of the Public Utility Commission is a record or judicial proceeding. *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, 443; *Broderick v. Rosner,* 294 U.S. 629.

The Public Utility Commission had jurisdiction over the person since it was the Railroad's own application to the Public Utility Commission. Whether the Public Utility Commission had jurisdiction over the subject matter was a matter in dispute. If by jurisdiction is meant the power to hear and determine causes of the class to which the particular controversy belongs (see *West Coast Exploration Co. v. McKay,* 213 F. 2d 582 (D.C. Cir. 1954), cert. denied, 347 U.S. 989), then the Public Utility Commission very definitely had jurisdiction over the subject matter. The continuance of railroad service in the State is expressly confided to the Public Utility Commission by statute. See sections 401 and 403 of the Public Utility Law (66 Purdon's Penna. Statutes Annotated, §§1171 and 1173). Even if the question of jurisdiction over the subject matter was an open one, if it is litigated and decided by an appropriate tribunal, and no appeal is taken, the issue cannot be retried in a subsequent action between the same parties: *Durfee v. Duke,* 375 U.S. 106; *Davis v. Davis,* 305 U.S. 32. The exceptions set forth in *Durfee v. Duke,* do not apply. In *Kalb v. Feuerstein,* 308 U.S. 433, the state court continued to decide a matter **AFTER** the Bankruptcy court obtained jurisdiction. In *U.S. v. U.S.F. & G. Co.,* 309 U.S. 506, the court had **no competency** to try a cross-claim against the Indian Nation which could be sued only in a federal district court in the Indian reservation.

On the other hand, the matters raised by the Railroad were certainly matters over which the P.U.C. had competency to determine.

III.

THE DISTRICT COURT SHOULD HAVE DECLINED JURISDICTION ON THE BASIS OF THE DOCTRINE OF COMITY

"Comity" is defined as "courtesy" or "complaisance" or "respect" by which "one authority gives way to another." **Black's Law Dictionary.** Comity is a rule of "convenience and expediency." It has the effect of "discouraging repeated litigation of the same question." Id.

The doctrine of comity, as it has become known in the federal courts, reached its acme in *Alabama Public Service Commission v. Southern Railway Company,* 341 U.S. 341 (1951). The doctrine was epitomized in the following sentence contained in that case (341 U.S. 349):

> "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights.
>
> "Equitable relief may be granted only when the District Court . . . is convinced that the asserted federal right **cannot be preserved** except by granting the 'extraordinary relief of an injunction in the federal courts'." . . .
>
> "Whatever rights appellee may have are to be pursued through the state courts. Burford v.

Sun Oil Co., 319 U.S. 315 (1943); Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U.S. 570, 577 (1941); Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U.S. 573, as amended, 311 U.S. 614, 615 (1940)."

The case at bar is almost identical to the *Alabama* case. In that case the Southern Railway Company had applied to the State Commission for permission to **discontinue** certain trains. The State P.S.C., after hearing, refused the application. Instead of pursuing its right to appeal to the state courts, the Railway Company filed a complaint in the District Court of Alabama claiming, *inter alia,* confiscation in violation of the Fourteenth Amendment. A three-judge statutory court enjoined the State P.S.C. order. The three-judge court saw no reason to withhold its judgment in the case even though state review was adequate and available. 91 F. Supp. 980, 985-986.

The United States Supreme Court reversed the decision. It held in effect that as a matter of law the District Court should have declined its jurisdiction.

The facts in the instant case are almost identical with those in the *Alabama* case. Similarities:

(1) Both cases involved a Railroad application to discontinue passenger train service within the state;

(2) A decision denying same had been rendered by the State Commission which was unappealed from;

(3) State appellate procedures are identical.

The only difference between the two cases is that here the federal question raised involves the Su-

premacy Clause whereas in the *Alabama* case the issue involved the due process clause. Does this difference in the federal question require a different result?

The essential holding in the *Alabama* case is not dependent upon the type of federal question involved, but rather whether there is adequate state appellate review. The nub of the holding may be found in the following words:

> "Appellee has not shown that the Alabama procedure for review of Commission orders is in any way inadequate to preserve for ultimate review in this Court any federal questions arising out of such orders."

In *Georgia v. Chattanooga*, 264 U.S. 472, 483, the U. S. Supreme Court said:

> "No complaint is made that the laws of Tennessee do not afford the State of Georgia and other owners reasonable notice and opportunity to be heard before the final determination of judicial questions that may be involved. . . .
>
> "It appears on the face of the bill of complaint that, if it so elects, Georgia has a plain, adequate and complete remedy in the condemnation proceedings instituted by the city. . . .
>
> "If the decision of that court shall deny to Georgia any rights secured to it by the Constitution and laws of the United States, the case may be brought here for reexamination and review."

In *Burford v. Sun Oil Co.*, 319 U.S. 315, the Supreme Court also required the litigant to go through

the State courts from the Commission (319 U.S. 333-334):

> "The state provides a unified method of the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate.
>
> "On the other hand, if the state procedure is followed from the **Commission to the State Supreme Court**, ultimate review of the federal questions is fully preserved here. Cf. Matthews v. Rodgers, 284 U.S. 521, 52 S. Ct. 217, 76 L. Ed. 447. Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand."

In *P.S.C. of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, the Supreme Court said:

> "The procedures of review (within the state) usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari, if a state court has allegedly denied a federal right."

In *Martin v. Creasey*, 360 U.S. 219, the Supreme Court said:

> "If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the

Commonwealth has deprived them of their property without due process of law, this Court will be here."

See also *Gulf, M. & O. R. Co. v. Louisiana Public Service Commission,* 120 F. Supp. 250 (La. D.C. 1954);

General Telephone Company of Southwest v. Robinson, 132 F. Supp. 39 (Ark. D.C. 1955);

Gulf Oil Corporation v. Corporation Commission of Oklahoma, 147 F. Supp. 640 (Okla. D.C. 1956).

There is no valid reason why the Railroad here should not have been required to appeal its case through the Pennsylvania courts, and, if necessary, to the United States Supreme Court. This is what the United States Supreme Court has said countless times under similar circumstances where state policies "clashed" (allegedly) with federal policies.

The P.U.C. here has attempted to fulfill its role. It was fully cognizant of its duty to obey the requirements of the United States Constitution, see Art. VI. It was this duty which led the Commission to the ultimate decision it reached. Complete review was adequate within the State courts and from there to the United State Supreme Court. If the Commission was wrong, there is no reason to believe that the state courts or the United States Supreme Court would be inadequate to correct the error!

For the reasons given, the Federal District Court committed error in entertaining jurisdiction and issuing the injunction against the State Commission.

CONCLUSION

To uphold the Federal Act under consideration would be opening up the last chapter in federal-state relationships, "and for all practical purposes we should have a completely centralized government." *Schechter Corp. v. U.S.*, 295 U.S. 495.

If State orders of the kind here can be eliminated without any record, then §1(18) cases can be dealt with without a record, and §13(4), can also be dealt with without a record, *ad infinitum.*

We have not yet endowed our Congress with the power of Parliament in England. Until we do, Congressional action must be viewed against the entire background of constitutional law. When this is done, we submit, the Act of Congress herein involved, must be declared unconstitutional as applied.

Only this Court can remedy the wrong done to the Commonwealth of Pennsylvania in eliminating its orders over intrastate commerce without the proper procedures. The petition for certiorari should be granted.

Respectfully submitted,
William A. Goichman
Assistant Counsel
Edward Munce
Assistant Counsel
Joseph C. Bruno
Chief Counsel
Attorneys for Petitioners

APPENDIX I

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 15855

The Pennsylvania Railroad Company,
Appellee,

v.

Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara and John L. Dorris, Individually and as Commissioners of the Pennsylvania Public Utility Commission
Appellants.

On Appeal From the United States District Court for the Middle District of Pennsylvania

---

Argued on October 4, 1966

Before Forman, Freedman and Seitz, *Circuit Judges.*

OPINION OF THE COURT

(Filed December 6, 1966)

By Seitz, *Circuit Judge.*

This appeal by the Pennsylvania Public Utility Commission ("P.U.C.") challenges an injunction issued by the District Court at the behest of the Pennsylvania Railroad ("Railroad") against enforcement of a P.U.C. order commanding the Railroad to restore certain train service within Pennsylvania.

In November 1960, the Railroad applied to the P.U.C. for authority to discontinue service at stations within Pennsylvania of two passenger trains which operated during the night between Harrisburg, Pennsylvania and Hagerstown, Maryland.[1] On August 7, 1961, the P.U.C. denied the application. Although there is an appeal provision, the Railroad did not appeal the decision. Rather, on January 24, 1962, the Railroad filed with the Interstate Commerce Commission a notice with supporting data of a proposed discontinuance of the trains effective February 25, 1962. This was done pursuant to Section 13a(1) of the Interstate Commerce Act (49 U.S.C. §13a(1)).[2] The Railroad concededly complied

---

[1] No Maryland application was filed because these trains did not provide intrastate service therein and thus the trains were not within the regulatory concern of that state, at least for present purposes.

[2] Section 13a(1) provides:

> "A carrier or carriers subject to this chapter, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other state or in the Dis-

with the requirements of that Act and pertinent regulations. The P.U.C. received notice and on Feb-

---

trict of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by orders served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission

ruary 8, 1962 served by mail a petition to intervene. A few other protests were also filed.

On February 8, 1962, the I.C.C. in a notice with a service date of February 12, 1962 reached its conclusion not to institute a formal investigation of the proposed discontinuance.[3]

On February 20, 1962—five days before the trains were to be discontinued—the P.U.C. served upon the Railroad a Rule to Show Cause why it should not be required to continue the operation of the trains in question within the State of Pennsylvania. By way of answer to the Rule the Railroad referred to its proceeding under the Interstate Commerce Act

---

may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers."

[3] The I. C. C. took this action before the expiration of the time fixed in the Railroad's notice for the filing of objections and obviously before it had received the P. U. C.'s petition. It was, to say the least, a most inappropriate procedure for the I. C. C. to follow. However, the P. U. C. does not argue that this method of handling the matter vitiated the decision, possibly because the I. C. C. still had time to change its decision had it so desired after the petition to intervene was received.

and argued that jurisdiction over the discontinuance of the trains had thereby become subject to the exclusive jurisdiction of the I.C.C. The Railroad discontinued the trains on February 25.

After the hearing on the Rule the P.U.C. on July 9, 1962 reaffirmed its order of August 7, 1961 and directed the Railroad to restore the particular trains. The P.U.C. decision was apparently not based on the grounds advanced by the parties but was bottomed on the unconstitutionality of Section 13a(1) of the Interstate Commerce Act, as here applied, under the Commerce and Due Process clauses of the Federal Constitution.

The Railroad also did not appeal this P.U.C. decision. Instead, it commenced the present action to enjoin the P.U.C. from enforcing its 1962 order. The District Court, with jurisdiction based upon 28 U.S.C.A. §1337, on February 9, 1966 enjoined the P.U.C. from instituting proceedings concerning the Railroad's action in discontinuing the trains in question. See P. R. R. v. Sharfsin, 240 F. Supp. 233 (M. D. Pa. 1965), an opinion by a three-judge District Court readopted verbatim after the Supreme Court had vacated the judgment on the ground that a three-judge court was not required and that appeal should be to this court. See also Sludden v. U. S., 211 F. Supp. 150 (M.D. Pa. 1962). This is the decision on the P.U.C.'s appeal from the trial court's judgment.

The P.U.C. first contends on various grounds that §13a(1) is unconstitutional as applied to this case. Stripped to its bare bones the P.U.C.'s argument is

that Congress cannot under the commerce clause empower the discontinuance of trains insofar as they may operate between station points within a single state, even though they are an integral part of an interstate trip, unless there is a finding that their intrastate movements constitute an undue burden on or interference with interstate commerce.

We first consider whether §13a(1) requires the procedure and showing which the P.U.C. says is required as a prerequisite to control of the operation of these trains within Pennsylvania. This section clearly does not by its terms require the showing of undue burden which the P.U.C. claims is mandatory to bind the state here. Indeed, when a(1) is compared with a(2), adopted at the same time, it is evident that Congress did not intend to require such a showing under a(1). In contrast, a(2) which embraces "any train or ferry operated wholly within the boundaries of a single state" specifically requires, inter alia, as a prerequisite to relief thereunder, a finding after an adversary type of hearing that the continued operation or service of the train or ferry without discontinuance or change in whole or in part would constitute an unjust and undue burden upon the interstate operations of the carrier. It would thus fly in the face of the evident Congressional intent to construe a(1) to require the I.C.C. to grant in this case a hearing at which the issues of undue burden on or interference with interstate commerce would be tried by the I.C.C. in a full adversary proceeding. We do not so construe it.

We are therefore required to examine the P.U.C. contention that Congress under §13a(1) cannot con-

stitutionally authorize discontinuances of intrastate train operations (two or more stops within a state) which are a part of an interstate train service without itself finding or providing for a finding that the intrastate operations are a burden on or interference with interstate commerce.

We commence from the established and governing law announced in New Jersey v. U.S., 168 Fed. Supp. 324 (D.C. N.J. 1958), aff'd., 359 U.S. 27 (1959). That case involved a ferry which operated between New Jersey and New York to service trains on the West Shore Line of the New York Central Railroad. The United States Supreme Court affirmed the district court decision holding, inter alia, that the procedure incorporated in §13a(1) was constitutional, at least on the facts there involved. The P.U.C. says the case is distinguishable because it involved a ferry which operated only in interstate commerce whereas in our case the trains operated in both interstate and intrastate commerce. While we think the force of New Jersey v. U.S. is greater than counsel for the P.U.C. would concede, it is certainly true that the factual distinction suggested by the P.U.C. does exist between the New Jersey case and ours. The question here is whether that distinction makes a difference.

The P.U.C.'s counsel contends that a fair reading of certain United States Supreme Court cases reveals a limitation on Congress' power under the commerce clause when it is exercised so as to affect intrastate commerce. It says that in such situations the Congress must either itself find that the particular intra-

state activity is an undue burden upon or interference with interstate commerce or provide for such a finding after a full hearing. We do not understand that the Railroad quarrels with this contention. Rather, it says that we are concerned solely with the application of congressional power over interstate commerce. The resolution of this conflict commences with an analysis of the legislation involved.

At the risk of repetition, it is important to understand the statutory scheme involved in §13a(1) and (2). Section 13a(1) deals with trains and ferries "Operating from a point in one State to a point in any other state * * *". In contrast (2) embraces trains and ferries which are "operated wholly within the boundaries of a single state * * *". As is noted in the House Report on this legislation, §13a(1) gives the railroads an option "to have the I.C.C., rather than state commissions, pass upon the discontinuance or change in the operation or service of any train or ferry. This option is limited, however, to the operation or service of a train or ferry on a line of railroad not located wholly within a single state." 2 U.S. Code Cong. & Legisl. News p. 3468 (1958). Section 13a(2), on the other hand, deals with purely intrastate operations. It protects the rights of the states "by leaving to the state regulatory agencies the right to regulate and have a final decision with respect to the discontinuance of train service which originated and ended within one particular state, except when it could be established that intrastate service was a burden on interstate commerce." 104 Cong. Rec. 15528. See also

Southern R. Co. v. North Carolina, 376 U.S. 93 (1964); and New Jersey v. New York, S. & W. R. Co., 372 U.S. 1 (1962).

Reading §13a(1) and (2) together with their legislative history makes it clear that under a(1) Congress was legislating with respect to all interstate train service. Thus, even the P.U.C. would presumably agree that by following the procedure outlined in a(1) the Railroad was entitled to discontinue the interstate service of the trains in question. But the P.U.C. says in effect that such an order could not affect the so-called intrastate aspect of their service without a finding in an adversary proceeding that the continuation of such service would be a burden upon or interference with interstate commerce.

Can it be said that an interstate train which serves more than one point within any state has an intrastate function which the Congress can regulate at the same time only by showing that it constitutes a burden upon or interference with interstate commerce? We think the answer to this question is found from an evaluation of the purpose of a particular interstate regulation when considered with the nature of the subject matter involved.

We think it is an unwarranted construction of the Commerce Clause to say that Congress may authorize the I.C.C. to permit without a hearing the discontinuance of trains which operate between states but may not authorize the I.C.C. to allow the discontinuance of the very same trains insofar as they operate wholly within those states except upon a finding, after hearing, that the intrastate operation is a bur-

den upon or interference with interstate commerce. We are satisfied that the mere fact that a train operating in interstate commerce makes more than one stop within a single state does not alter the interstate character of its operation so as to limit the power of Congress to legislate fully with respect thereto.

We reach these conclusions because effective regulation in this area of interstate commerce would be substantially frustrated if each state retained authority over the so-called intrastate portions of the operation after termination of interstate service.[4] This conclusion is evident from a consideration of the practicality of the situation. We take notice that many interstate trains pass through several states, making more than one stop within each state. Under the P.U.C.'s view §13a(1) would be largely meaningless as applied to the so-called intrastate segments because after permission was obtained under §13a(1), the carrier would then have to apply to each such state or if refused, proceed under §13a (2). Certainly a(1) of the statute was not intended to so operate and we do not believe it is unconstitutional because it permits regulation of all interstate train service, including service between points within a state, without a finding of burden upon or interference with interstate commerce.

We think the case law amply supports the conclusion that the fact of service between points with-

[4] Indeed, the P. U. C. would presumably contend that the limitation for which it contends would be applicable to any change in the operation of these trains between stops within Pennsylvania.

in a state of an interstate train does not limit congressional power to deal with the so-called intrastate aspects to cases where proof of burden on or interference with interstate commerce can be shown. Rather, we think that no state power to order the continuance of these trains within Pennsylvania survived the proper invocation of §13a(1) by the Railroad.

As the Supreme Court said in Colorado v. U.S., 271 U.S. 153, 165-6 (1926):

> "Because the same instrumentality serves both [interstate and intrastate commerce], Congress has power to assume not only some control, but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission."

It was also contended by the State in the Colorado case "that the other [of the I.C.C.] is void, so far as it relates to intrastate traffic, because essential findings were not made * * *". One finding alleged to be essential and lacking was that "by continued

operation of the branch interstate or foreign commerce will be discriminated against, * * *". Later in the opinion the court gave its answer:

> "While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the Act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against interstate commerce, or that it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier within the State, or that it will result in a denial of such compensation for the property within the State used in commerce intrastate and interstate. The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce."

The P.U.C. says our case calls for an answer to a question suggested but avoided in Texas v. Eastern Texas R.R. Co., 258 U.S. 204 (1922). In that case the railroad involved owned a line which, while apparently connecting with lines in other states, was located entirely within one state. It carried both interstate and intrastate commerce. The I.C.C. granted the railroad authority to abandon and cease operating the road. The state claimed that the I.C.C. did not have the power to authorize an abandonment of the intrastate operations.

The United States Supreme Court decided that the Congress had the power to act through the I.C.C. to authorize a termination of the interstate traffic on the railroad. The court then said that if certain paragraphs of the act of Congress were to be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, "a serious question of their constitutional validity will be unavoidable". It is this point which the P.U.C. argues most earnestly must now be decided. However, we do not believe the question is presented here, as reference to the language of the opinion will show. The court there said:

> "The road lies entirely within a single State, is owned and operated by a corporation of that State, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce."

Again in the same opinion it is said:

> "* * * As a whole these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only

as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce."

Here, the fact aside that the Railroad's lines do not lie entirely within Pennsylvania, the important circumstance is that the very trains in question operated across state lines. Nor is it permissible here to "convert" these trains into intrastate trains by viewing them apart from and after termination of their interstate operation. We do not believe that such a fragmenting approach is legally or practically permissible. When it adopted §13a(1) Congress preempted the field in the area involved under its interstate commerce power and a finding of a reserved power in this area in the states is incompatible therewith. We conclude that §13a(1) as construed represents a constitutional exercise of power by Congress under the Commerce Clause.

The P.U.C. next argues that §13a(1), in permitting supercession of a state order to take place whenever a railroad files a notice of discontinuance, is an unlawful delegation of legislative power to a private person.

The short answer to this contention is that there is no delegation to a private person. The Congress itself determined that a self-implementing procedure would be established. New Jersey v. U.S., 168 F. Supp. 324 (D.C. N.J. 1958); aff'd., per curiam 359

U.S. 27 (1959). But let us look beyond that answer. It is true that the railroad files the notice under a(1), but even that is not the end of the matter. Under a(1) the I.C.C. must decide whether it believes an investigation is warranted. See New Jersey v. U.S., above.

The P.U.C. also contends that §13a(1) as applied in this case violates the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

Counsel for the P.U.C. concedes that there is no direct authority to support its position. Nevertheless we look to the merits of the contention. Actually, the P.U.C. is saying that Congress should have made provision for the States affected to present their case at a hearing. The prime answer is found in State of New Jersey v. U.S., supra, where the Due Process argument was rejected. Since Congress had plenary power over interstate commerce it alone was the judge of the appropriate procedure to be incorporated in a(1).[5] We are not concerned with any taking of property or invasion of any other constitutionally protected right.

The P.U.C. next contends that the Administrative Order of the P.U.C. is a "record" or "judicial pro-

[5] We should note that the Railroad submitted to the I. C. C. with its notice of intent to discontinue these trains a rather elaborate statement of the passenger use, revenues, etc. of these trains and referred to the proceedings before the P. U. C. While the P. U. C. challenges the accuracy of some of the statements, it has not called upon us to decide in this proceeding whether the I. C. C. had a sufficient basis for exercising its discretion not to investigate.

ceeding" within the Full Faith and Credit Clause and should have been accorded the same respect as it receives by the state. Apart from anything else, we think that when the Railroad submitted this matter to the I.C.C. under §13a(1) on January 24, 1962, the P.U.C. was without further jurisdiction of the particular subject matter. This conclusion follows from the language of §13a(1). Thus, the P.U.C.'s order of July 9, 1962, was not entitled to Full Faith and Credit.

Finally, the P.U.C. says the district court should have declined to exercise jurisdiction on the basis of the doctrine of comity. Courts generally should be most conscious of the need to avoid unnecessary encroachment on pending proceedings in other forums. However, it is evident that the application of the comity doctrine here would fly directly into the face of the Congressional intent as expressed in §13a(1). For that section is, by its terms, to be applicable even though the railroad involved is subject to any state "order" or has "any proceeding pending" before a state agency. Combining the exclusive nature of the power supporting the enactment of §13a(1) with the intent there manifested, we think it would at best be inappropriate to apply the comity doctrine in favor of the State Commission's order.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATE COURT OF APPEALS
For the Third Circuit

Order No. 15,855

The Pennsylvania Railroad Company,
Appellee

vs.

Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara and John L. Dorris, Individually and as Commissioners of the Pennsylvania Public Utility Commission,
Appellants

Now this Fifth Day of December, 1966, it appearing that the Public Utility Commission's motion to strike portions of The Pennsylvania Railroad Company's brief has become moot in view of the Court's disposition of the appeal it is

Ordered that the Public Utility Commission's motion be denied.

(s) Collins J. Seitz
United States Circuit Judge

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 15,855

The Pennsylvania Railroad Company

vs.

Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara and John L. Dorris, Individually and as Commissioners of the Pennsylvania Public Utility Commission,

Appellants

(D. C. Civil No. 7810)

On Appeal from the United States District Court for the Middle District of Pennsylvania.

Present: Forman, Freedman and Seitz, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 9, 1966, be, and the same is hereby affirmed, with costs.

Attest:
Ida O. Creskoff
Clerk

December 6, 1966

APPENDIX II

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

The Pennsylvania Railroad Company sued to enjoin the enforcement of a duly promulgated order of Pennsylvania Public Utility Commission. The matter was referred to a three-judge court which in due course decided the case in favor of the Railroad and issued an appropriate injunction. The Commission appealed to the Supreme Court which in an opinion dated December 13, 1965 held, for reasons therein stated, that the injunction sought by the Railroad was not grounded in the "unconstitutionality" of a state measure so as to require a three-judge tribunal under 28 U.S.C. §2281. The Court accordingly vacated the judgment of the three-judge court and remanded the case to this Court so that it may enter a fresh decree from which a timely appeal may be taken to the Court of Appeals.

Therefore, in accordance with the opinion of the Supreme Court above referred to, on this 9 day of February, 1966, I file the following as the opinion and order of this Court:

OPINION

Plaintiff, hereinafter called "Railroad", is now and for many years last past has been a Pennsylvania

corporation engaged as a common carrier in the transportation of persons and property by railroad in interstate commerce between the Cities of Harrisburg, Pennsylvania, and Hagerstown, Maryland. Its principal office is in Philadelphia, Pennsylvania.

Defendants, Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara and John L. Dorris, hereinaffer called "Commissioners", are now and for many years last past have been the duly appointed, qualified and acting members of the Pennsylvania Public Utility Commission, hereinafter called "P.U.C", and said Commissioners are citizens and residents of the Commonwealth of Pennsylvania.

Railroad herein seeks injunctive relief restraining and enjoining the said Commissioners personally, and in their official capacities as Commissioners as aforesaid, from enforcing certain Orders of said P.U.C., and commanding said Commissioners to revoke and withdraw the said Orders of said P.U.C. and to dismiss the Rule To Show Cause issued upon Railroad.

The parties, Railroad and Commissioners, filed a paper entitled "Case Stated" in which it is averred:

> "It is agreed by the parties that Your Honorable Court can make all of its findings of fact in this case from the within 'Case Stated' and the exhibits attached thereto. Any party is free to urge upon the Court any findings of fact based upon the within 'Case Stated' and the exhibits attached hereto."

Since the facts and documents involved are not in dispute, the parties have submitted this "Case Stated" to avoid the necessity of trial.

From the aforesaid "Case Stated" it appears that:

On August 9, 1962, Railroad instituted a suit in this Court to enjoin P.U.C. from enforcing its Order of July 9, 1962 requiring Railroad to restore and maintain service on its trains Nos. 638 and 645 operating between the City of Harrisburg and the Pennsylvania-Maryland boundary line.

Suit was instituted in this Court under the Act of Congress of June 25, 1948, Chapter 646, 62 Stat. 931, 28 U.S.C. §1337, and the Act of Congress of August 12, 1958, P. L. 85-625, Section 5, 72 Stat. 571, commonly known as the Transportation Act of 1958 and incorporated into the Interstate Commerce Act as Part I, 49 U.S.C. §13a(1).

The suit had its origin in an application filed by Railroad on November 29, 1960, before the P.U.C., seeking approval of its proposal to discontinue passenger train service of its said trains Nos. 638 and 645 operating daily between Harrisburg, Pennsylvania, and Hagerstown, Maryland.

Protests were filed and after hearings were held, the P.U.C. denied the application on August 7, 1961. No appeal was taken from this Order in accordance with Section 1112 of the Pennsylvania Public Utility Law, 66 P.S. §1442.

On January 25, 1962, Railroad filed with Interstate Commerce Commission, hereinafter called "I.C.C.", a "Notice of Proposed Discontinuance of Service" under the provisions of Section 13a(1) of the Interstate Commerce Act, supra. Railroad also filed with

I.C.C. a "Statement in Relation to the Proposed Discontinuance of Interstate Passenger Trains 638 and 645" as required by regulations of I.C.C., and in other respects complied with Section 13a(1) and regulations aforesaid applicable thereto.

The said Notice of January 25, 1962, supra, recited that the said trains served one station in Maryland and four stations in Pennsylvania. The Notice also recited, "that persons desiring to object to the proposed discontinuance should promptly notify the Interstate Commerce Commission at Washington, D. C., of such objection and the reasons therefor, before February 11, 1962." The Notice indicated that the proposed discontinuance would be effective February 25, 1962.

Protests were filed with the I.C.C. On February 8, 1962, P.U.C. mailed to I.C.C. a protest in the nature of a Petition To Intervene. On February 13, 1962, the P.U.C. received a notice from the I.C.C. dated February 8, 1962, and bearing service date of February 12, 1962. This Notice announced that the I.C.C. would not enter upon an investigation of the proposed discontinuance of Railroad's trains Nos. 638 and 645.

Requests for reconsideration of this decision were denied by the I.C.C. by Order dated March 23, 1962.

On February 20, 1962, P.U.C. issued upon Railroad a Rule To Show Cause why Railroad should not comply with P.U.C.'c Order of August 7, 1961. Within the fifteen day period allowed for answer, Railroad filed its answer on February 27, 1962, alleging that

under Section 13a(1) it validly and properly discontinued passenger service on its trains Nos. 638 and 645 as of February 25, 1962.

P.U.C. set its Rule To Show Cause down for hearing on April 6, 1962, at Philadelphia, where the facts above stated were educed.

On July 9, 1962, P.U.C. issued its Order making the Rule To Show Cause absolute and ordered Railroad to restore and continue service as required by its prior Order of August 7, 1961.

Railroad did not appeal this Order of July 9, 1962 to the Superior Court of Pennsylvania, as provided by Section 1101, 66 P.S. §1431, et seq.

On August 9, 1962, Railroad filed its Complaint in this Court, alleging that P.U.C.'s Order of July 9, 1962 was unlawful and issued in defiance of Section 13a(1) of the Transportation Act of 1958 and of the Railroad's rights thereunder; that it acted lawfully under the authority of Section 13a(1) in discontinuing the said trains; that by virtue of certain provisions of the Pennsylvania Public Utility Law it and its officers and employees would be subject to certain sanctions and substantial expense for train crews and operating costs if it had to run the said trains.

On August 24, 1962, P.U.C. moved to dismiss the Complaint on grounds of res judicata, full faith and credit and comity. The Court, holding that at that time it could not be said Railroad's Complaint had not set forth a cause of action which called for relief, especially in the light of the opinion of the three-judge court in this district in the case of Sludden et

al. v. United States of America et al., 211 F. Supp. 150, denied the motion. P.U.C. answered.

A three-judge court in a proceeding involving the identical facts of this case held that Section 13a(1) of the Interstate Commerce Act as amended in 1958, 49 U.S.C. §13a(1), is constitutional and deprives neither the State nor any individual of any right which the Constitution of the United States guarantees, Sludden et al. v. United States et al., supra. See also, State of New Jersey et al. v. United States et al., D.C. N.J. 168 F. Supp. 324 (1958), aff. per curiam, 359 U.S. 27 (1959). P.U.C.'s insistence that the New Jersey case was distinguishable from the instant case in that the former was exclusively interstate while the latter was both interstate and intrastate was duly considered by the Court in Sludden.

We adhere to the conclusion expressed in Sludden that Section 13a(1) is constitutional. While in view of our conclusion as to this Act's constitutionality it would seem no further discussion thereon is necessary, it might, however, be well to call attention to a few very pertinent facts.

1. By this Act it is clear that Railroad had its option to have I.C.C. rather than P.U.C. pass upon discontinuance of the said trains.

2. It is implicit in the Act that the I.C.C. had the right to act definitively by mere inaction. As stated in Sludden, supra, "(2) unless the Commission acts, the carrier may discontinue or change the service in accordance with the notice, 'the laws or constitution of any State, or the decision or order of, *or the pen-*

dency of any proceeding before, any court or State authority to the contrary notwithstanding' ''.[1] (Emphasis supplied.)

3. The action of I.C.C. in concluding not to institute an investigation into a proposed discontinuance of train service is committed to the exclusive discretion of I.C.C. and is not subject to judicial review.

4. As stated in Sludden, supra, protests were filed with I.C.C. after which it did make a determination.

5. Exclusive dominion of this matter is vested by Congress in I.C.C., Sludden, supra; Colorado v. United States et al., 271 U.S. 153, 165 (1926).[2]

Now that the case is fully before the Court on the basis of the "Case Stated", P.U.C. feels that the time is now ripe to review its motion for dismissal on the basis of res judicata, full faith and credit and comity.

When on January 24, 1962 Railroad submitted this matter to I.C.C. under Section 13a(1) jurisdiction over the continuance or discontinuance of the trains

---

[1] To permit a State order affecting intrastate transportation that would be in contravention of an I.C.C. order affecting interstate transportation would be completely repugnant to the basic purpose of Section 13a(1) as shown by its legislative history. (See Sludden, supra, also New Jersey v. New York, Susquehanna & Western Railroad Co., 372 U.S. 1 (1963).

[2] The fallacy of P.U.C.'s position becomes evident when one considers the chaos that would result in interstate commerce if each State crossed by an interstate line passing through a number of States could by its actions prevent discontinuance of such line within its borders and thus negate I.C.C. regulations covering the entire line.

was vested exclusively in I.C.C. P.U.C.'s Order of July 9, 1962 was therefore completely abortive. Accordingly, the P.U.C. Order of July 9, could not on any theory be res judicata and I.C.C. was under no obligation to give full faith and credit to P.U.C.'s invalid Order. Berkamn v. Ann Lewis Shops, D.C. S.D. N.Y. 142 F. Supp. 417 (1956); Illinois Central R.R. v. Mississippi Pub. Serv. Comm., D.C. S.D. Miss., 135 F. Supp. 304 (1955); Hanson v. Denckla, 357 U.S. 235, 255 (1958).

Finally, as to comity, this Court is fully conscious of the desirability of maintaining the delicate balance between State and Federal authority. However, we feel that comity is not at issue in this case. There are no factual issues nor any issue of State law here involved. The only issue raised in this case is the constitutionality of a Federal statute. We have found the act in question constitutional.

Plaintiff Railroad is entitled to a permanent injunction enjoining defendants, Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara, and John L. Dorris, individually and as Commissioners of the Pennsylvania Public Utility Commission, together with the successors of each of them, and their agents, servants and attorneys, from pursuing any of the remedies by mandamus, injunction, fine or imprisonment provided in the Pennsylvania Public Utility Act, or otherwise, for the purpose of compelling plaintiff, Railroad, to reinstate its trains Nos. 638 and 645 operating between the City of Harrisburg and the Pennsylvania-Maryland boundary line, pursuant to the provisions of the

Pennsylvania Public Utility Act and said P.U.C.'s Order of July 9, 1962.

(s) Frederick V. Follmer
United States District Judge

ORDER

Now, February 9, 1966, in accordance with Opinion this day filed, It is Ordered and Decreed that Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara, and John L. Dorris, individually and as Commissioners of the Pennsylvania Public Utility Commission, together with the successors of each of them and their agents, servants and attorneys, be and they are hereby permanently enjoined from pursuing any of the remedies by mandamus, injunction, fine or imprisonment provided in the Pennsylvania Public Utility Act, or otherwise, for the purpose of compelling plaintiff, The Pennsylvania Railroad Company, to reinstate its trains Nos. 638 and 645 operating between the City of Harrisburg and the Pennsylvania-Maryland boundary line.

(s) Frederick V. Follmer
United States District Judge

APPENDIX III

DECISION OF THE UNITED STATES SUPREME COURT

(86 S. Ct. 423)

December 13, 1965

Per Curiam

In the three-judge District Court from which this appeal comes to us, the Pennsylvania Railroad Company sued to enjoin the enforcement of a duly promulgated order of the Pennsylvania Public Utility Commission on the sole ground that the order conflicted with a federal statute. The Commission, among other defenses, contended that the federal statute was unconstitutional, but the District Court decided the case in favor of the railroad and issued an appropriate injunction. 240 F. Supp. 233.

[1-3] It follows from our recent decision in Swift & Co. v. Wickham, 86 S. Ct. 258, that the injunction sought by the railroad, being based on incompatibility between the state order and the federal statute, was not grounded in the "unconstitutionality" of a state measure so as to require a three-judge tribunal under 28 U.S.C. §2281 (1964 ed.). Nor is §2282, requiring such a tribunal in order to enjoin "any Act of Congress for repugnance to the Constitution," invoked by the Commission's defense that the federal statute is unconstitutional; it is settled that this provi-

sion "does not provide for a case where the validiy of an act of Congress is merely drawn in question, albeit that question be decided, but only for a case where there is an application for an interlocutory or permanent injunction to restrain the enforcement of an act of Congress." International Ladies' Garment Workers' Union v. Donnelly Garment Co., 304 U.S. 243, 250, 58 S. Ct. 875, 879, 82 L. E. 1316.

[4-5] Because a three-judge court was not required to adjudicate this suit, this Court has no jurisdiction under 28 U.S.C §1253 (1964 ed.) to entertain a direct appeal. It does not appear from the record that the Commission lodged a protective appeal in the Court of Appeals, and the time to do so has almost certainly expired. The appeal to this Court occurred before Swift & Co. v. Wickham, supra, was decided, and there is no reason why the Commission should be deprived of appellate review. In accordance with precedent, we vacate the judgment below and remand the case to the District Court so that it may enter a fresh decree from which a timely appeal may be taken to the Court of Appeals. See Phillips v. United States, 312 U.S. 246, 254, 61 S. Ct. 480, 484, 85 L. Ed. 800.

It is so ordered.

Judgment vacated and case remanded to District Court.

APPENDIX IV

OPINION OF THE DISTRICT COURT

This is a motion by defendants to dismiss the above stated action.

Plaintiff is The Pennsylvania Railroad Company (hereinafter referred to as "Railroad"), a Pennsylvania corporation with its principal office in the City of Philadelphia, Pennsylvania. The defendants are Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara, and John L. Dorris, individually and as Commissioners of the Pennsylvania Public Utility Commission (hereinafter referred to as "P.U.C.").

The Complaint sets forth, inter alia:

1. that the suit arose under the Act of Congress approved June 25, 1948, c. 646, 62 Stat. 931, 28 U.S.C. §1337, and the Act of Congress regulating commerce approved August 12, 1958, Pub. L. 85-625, §5, 72 Stat. 571, otherwise known as the Transportation Act of 1958 and as Section 13a(1) of the Interstate Commerce Act, Part I, 49 U.S.C. §13a(1);

2. that Railroad, prior to February 25, 1962, operated two passenger trains, in interstate commerce, designated No. 638 and 645, between the cities of Harrisburg, Pennsylvania and Hagerstown, Maryland;

3. that Railroad, on November 28, 1960, filed an application with the P.U.C. at Application Docket 87818 seeking permission to discontinue, within the Commonwealth of Pennsylvania, the operation of the aforesaid passenger trains;

4. that the P.U.C., after public hearings, denied Railroad's application by its Order of August 7, 1961. No appeal was taken from that Order;

5. that Railroad, on January 25, 1962, filed with the Interstate Commerce Commission a "Notice of Proposed Discontinuance of Service" under authority of Section 13a(1) of the Interstate Commerce Act and filed with the Interstate Commerce Commission a "Statement in Relation to the Proposed Discontinuance of Interstate Passenger Trains 638 and 645" as required by the regulations of the Interstate Commerce Commission;

6. that the Interstate Commerce Commission, on February 12, 1962, released a Notice of its conclusion not to enter upon an investigation of the proposed discontinuance of Railroad's passenger trains No. 638 and No. 645;

7. that the P.U.C., on February 20, 1962, issued upon Railroad a Rule To Show Cause why Railroad should not comply with the Order of the Commission of August 7, 1961;

8. that Railroad, on February 25, 1962, discontinued the operation of passenger trains No. 638 and No. 645 pursuant to its Notice of January 25, 1962, and under authority of Section 13a(1) of the Interstate Commerce Act aforesaid;

9. that the P.U.C., after argument on the Rule To Show Cause issued upon Railroad, by its Order of July 9, 1962, made the Rule To Show Cause absolute and ordered Railroad to restore and continue to maintain service as required by the Order of the P.U.C. of August 7, 1961. The said Order of July 9, 1962, was unlawful and issued in defiance of Section 13a (1) of the Transportation Act of 1958 and of Railroad's rights thereunder. The P.U.C. purported to justify its said Order on the ground that Section 13a(1) aforesaid was unconstitutional;

10. that the Order of the P.U.C. requiring Railroad to restore to service passenger trains No. 638 and No. 645 was beyond the jurisdiction of the Commission. By virtue of Section 13a(1) of the Transportation Act of 1958, supra, and the action of the Railroad pursuant thereto, jurisdiction over the said trains No. 638 and No. 645 was vested solely and exclusively in the Interstate Commerce Commission. Furthermore, the P.U.C. has no power or authority to declare unconstitutional or otherwise refuse to be bound by an Act of Congress regulating Interstate commerce;

11. that Railroad has acted lawfully, under authority of Section 13a(1) aforesaid, in discontinuing the operation of its passenger trains No. 638 and No. 645 and in omitting to restore said trains to service. Although Railroad believes and avers that the action of the P.U.C. and its Order of July 9, 1962 is unlawful, nevertheless, Railroad would be subject, to the imposition of penalties under authority of the Act of Assembly approved May 28, 1937, P. L. 1053, Article

XIII, Section 1301, 66 P.S. §1491, at the rate of $50.00 for each day in which it fails to obey the aforesaid Order, if the said Order of the P.U.C. is lawful. Railroad, its officers and employees, would further be subject, under authority of the Act of Assembly approved May 28, 1937, P. L. 1053, Article XIII, Section 1302, 66 P.S. §1492, to criminal prosecution entailing possible penalties of $500.00 and imprisonment for one year for Railroad's failure to obey the aforesaid Order of the P.U.C. if said Order is lawful;

12. that the enforcement of the Order of the P.U.C. issued July 9, 1962, restoring passenger trains No. 638 and No. 645 to operation, would unlawfully and irrevocably deprive Railroad of its property, since Railroad would be put to enormous expense for train crews, operating equipment and other necessary costs at a net expense to it of many thousands of dollars and would deprive Railroad of the major savings made possible by the discontinuance of said trains;

13. that plaintiff has no adequate remedy at law for the wrong complained of.

The Complaint prayed the Court to,

"(a) issue its Order restraining and enjoining the Defendants, Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara and John L. Dorris, personally, and in their official capacities as Commissioners of the Pennsylvania Public Utility Commission, and their successors in office, from enforcing the Order of the Pennsylvania Public Utility Commis-

sion of July 9, 1962, or imposing any penalties, civil or criminal, for noncompliance therewith;

"(b) command and compel the Defendants, Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara and John L. Dorris, to revoke and withdraw the Order of the Commission issued July 9, 1962, and dismiss the Rule To Show Cause issued upon Plaintiff, on February 20, 1962; and

"(c) grant unto Plaintiff such other relief as equity and justice may require."

The Motion To Dismiss is predicated on the following reasons:

1. The Court should, in its discretion as a Court in equity and for the reasons of comity, decline to exercise its jurisdiction invoked by Railroad.

2. The Order of the P.U.C., unappealed from is entitled to full faith and credit under Article IV, Section 1 of the United States Constitution; Act of June 25, 1948, 62 Stat. 947, 28 U.S.C. §1738 and 28 U.S.C. §1739.

3. In the event that the doctrine of "full faith and credit" is held to be inapplicable, the Complaint should be dismissed on the ground of res judicata.

In support of their first reason (comity) defendants state:

(a) That on February 20, 1962, P.U.C. issued upon Railroad a Rule To Show Cause why it should not comply with the P.U.C. Order of August 7, 1961, requiring Railroad to maintain service between the

City of Harrisburg and the Pennsylvania-Maryland boundary line. On February 27, 1962, Railroad answered the Rule and raised the question of supremacy of the Federal Transportation Act of 1958 concerning Section 13a(1) of that Act, 49 U.S.C. §13a(1). On April 6, 1962, a hearing was held at which Railroad appeared through its counsel and stipulated to the facts in controversy, again raising the question of Federal supremacy under the said Federal Transportation Act of 1958. On July 9, 1962, P.U.C. issued its Order, served upon the Railroad on July 11, 1962, rejecting the arguments of Railroad.

(b) Railroad was properly before P.U.C. concerning the question of discontinuance of intrastate transportation, in fact Railroad had invoked the jurisdiction of P.U.C. by filing its application before P.U.C. on November 29, 1960.

(c) Under the Act of May 28, 1937, P. L. 1053, Section 1101, 66 P.S. §1431, an aggrieved party must appeal an Order of P.U.C. to the Superior Court of Pennsylvania within thirty days after service of the Order.

(d) Under the Public Utility Law, to which the Railroad was subject in its litigation before the P.U.C., the Railroad was required to file an appeal to the Superior Court within thirty days from the service of the P.U.C. Order of July 9, 1962. Had this been done, the further appellate procedure before the Supreme Court of Pennsylvania and ultimately before the Supreme Court of the United States would have been available.

(e) The regulation of intrastate transportation between points in Pennsylvania is based upon predomi-

nantly local factors, and the federal questions raised by the Railroad were considered fully by P.U.C. in its Order of July 9, 1962, and had proper appeal been taken, undoubtedly would have been considered fully by both the State Superior Court, State Supreme Court and United States Supreme Court.

In support of their second reason (full faith and credit), defendants state:

(a) The federal questions raised by the Railroad were fully discussed and overruled by the P.U.C. Railroad elected not to appeal the Order of P.U.C. of July 9, 1962, but instead elected to permit the Order of P.U.C. to become final.

(b) Under the provisions of Section 1112 of the Public Utility Law (66 P.S. §1442) the Order of P.U.C. is conclusive upon the Railroad, admittedly a party to the proceeding and subject to the jurisdiction of P.U.C., which the Railroad had initially invoked. Under the law of Pennsylvania, Railroad is not at liberty to question the validity of the Order of P.U.C. from which no appeal was taken. By federal statute, 28 U.S.C. §1738, all courts in the United States must give to such an order the same faith and credit as such order would have in the Courts of Pennsylvania.

(c) Because the effect of Railroad's failure to appeal Order of P.U.C. of July 9, 1962 is res judicata of the matters properly before the P.U.C., Complaint should be dismissed as an attempt to relitigate the issues which were litigated to a finality in Pennsylvania.

In support of their third reason (res judicata) defendants state:

In the event the Court determines that the full faith and credit clause does not apply to the orders and decrees of the P.U.C., nonetheless the Order of P.U.C. being unappealed from and involving same subject matter, same parties, same issues and same interests must be held to be res judicata.

A time schedule is set forth in the margin setting forth in chronological order the various steps taken in connection with the efforts of Railroad to discontinue the operation of two of its trains engaged in an interstate service between Harrisburg, Pennsylvania and Hagerstown, Maryland.[1]

---

[1] Nov. 28, 1960, Railroad applies to P.U.C. for leave to discontinue passenger train service between Harrisburg and Pennsylvania-Maryland boundary line (intrastate portion of this run).

Aug. 7, 1961, P.U.C. denies Railroad's application of Nov. 28, 1961.

Jan. 25, 1962, Railroad filed notice of its intention to discontinue (effective February 25, 1962) the operation of trains No. 638 and No. 645 operating daily between Harrisburg, Pennsylvania and Hagerstown, Maryland, under Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. §13a(1,) etc.

Feb. 8, 1962, I.C.C. determined not to enter upon an investigation of the proposed train discontinuance.

Feb. 15, 1962, Time for I.C.C. to object expired.

Feb. 20, 1962, P.U.C. issued Rule on Railroad To Show Cause why the service in question should not be continued and enjoining Railroad from discontinuing intrastate portion of run until further order of P.U.C.

Feb. 25, 1962, Thirty day notice period under 49 U.S.C. §13a(1) expired and Railroad discontinued the operation of trains No. 638 and No. 645 over the entire inter-

From this schedule it will be noted that Railroad initially sought its relief from P.U.C. That upon failing here and without appealing it, sought relief under the Interstate Commerce Act. Then followed a series of conflicting imponderables: on the one

---

state route, i.e., Harrisburg, Pennsylvania to Hagerstown, Maryland.

Feb. 27, 1962, Railroad filed Answer to Rule of P.U.C. averring it had applied to I.C.C. under 49 U.S.C. §13a (1), and that because of failure of I.C.C. to enter upon an investigation, Railroad became authorized to discontinue the trains in question.

Mar. 23, 1962, I.C.C. dismissed requests for reconsideration of its decision not to enter upon an investigation of the proposed train discontinuance.

July 9, 1962, P.U.C. reaffirmed its Order of August 7, 1961, and ordered Railroad to resume and continue the passenger service in question which Railroad had abandoned on February 25, 1962.

Aug. 8, 1962, Railroad filed instant suit against P.U.C. seeking (a) to restrain and enjoin P.U.C. from enforceing its Order of July 9, 1962, or imposing any sanctions for noncompliance; (b) an Order compelling P.U.C. to revoke its Order of July 9, 1962 and to dismiss its Rule To Show Cause issued February 20, 1962.

Sept. 10, 1962, Hearing before Three Judge Court In re: Sludden et al. v. United States of America, Interstate Commerce Commission and The Pennsylvania Railroad Company, D.C.M.D. Pa., Civil Action No. 7680, Opinion filed November 29, 1962,—F. Supp.—. The action sought to set aside alleged actions of I.C.C. taken on February 8, 1962 and March 23, 1962. The suit was by various labor organizations against I.C.C. and involved the same facts as the instant case, however, P.U.C. was not a party. The Opinion held that Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. §13a (1), is constitutional and granted motions of the United States of America, Interstate Commerce Commission and The Pennsylvania Railroad Company to dismiss the Complaint.

hand, definitive orders of the P.U.C.; on the other hand, failure to enter upon an investigation in accordance with the provisions of the Interstate Commerce Act, which failure in and of itself, under the terms of the said Act, vested certain rights in Railroad. Availing itself of the rights thus acquired under the Federal statute, Railroad discontinued the complete interstate operation of the two trains only to find itself faced with the Order of the State regulatory body to resume and continue the intrastate movement of the two trains. Failure to comply with the latter Order automatically subjects Railroad to the sanctions, civil and criminal, of the pertinent Pennsylvania statute, to wit: Act of May 28, 1937, P. L. 1053, art. XIII, §§1301 and 1302, 66 P.S. §§1491 and 1492. Here again with respect to P.U.C. Order of July 9, 1962 (to resume and continue operations), Railroad failed to appeal as it had previously failed to appeal the P.U.C. Memorandum of August 7, 1961 denying Railroad's original application of discontinue.

From the foregoing it cannot be said at this time that Railroad in its Complaint has not set forth a cause of action which calls for relief, especially in the light of the Opinion of the Three Judge Court in this District in the case of Sludden et al. v. United States of America et al., supra, which Opinion was written by the writer of the instant Opinion and of which this Court presently takes judicial notice.

I do not feel that the various issues raised by defendants in their Motion To Dismiss, to wit: comity, full faith and credit, and res judicata, are matters which call for consideration, much less extended dis-

cussion, in the present posture of the case, to wit: on the Motion To Dismiss.

Accordingly, defendants' Motion To Dismiss will be denied.

March 20, 1963

(s) Frederick V. Follmer
United States District Judge

ORDER

Now, March 20, 1963, in accordance with Opinion this day filed, It Is Ordered and Decreed that defendants' Motion To Dismiss be and the same is hereby denied.

(s) Frederick V. Follmer
United States District Judge

APPENDIX V

ORDER

By the Commission, August 7, 1961:

The Pennsylvania Railroad Company filed the above-captioned application on November 29, 1960, to abandon the Pennsylvania intrastate portion of the runs of trains Nos. 638 and 645, operating daily between Harrisburg, Pennsylvania, and Hagerstown, Maryland. These trains provide the only remaining passenger train service on the Cumberland Valley Branch of applicant's Philadelphia Region. The distance between Harrisburg and the Pennsylvania-Maryland boundary line is approximately 68 rail miles.

Train No. 638 normally consists of one sealed express and mail car, one coach enroute from Roanoke, Virginia, to Harrisburg, and one Pullman sleeping car providing roomette and bedroom accommodations, enroute from Roanoke to New York City. These cars are operated from Roanoke to Hagerstown by Norfolk and Western Railroad Company as N. & W. Train No. 2, which leaves Roanoke at 7:50 p.m., E.S.T., and arrives in Hagerstown at 2:40 a.m., E.S.T. Train No. 638 is scheduled to depart from Hagerstown at 3:55 a.m., E.D.T., and makes intermediate stops at Greencastle, Chambersburg and Carlisle, with arrival in Harrisburg scheduled for 6:20 a.m., E.D.T. Upon

arrival in Harrisburg, the coach passengers from train No. 638 traveling to points east of Harrisburg must change to PRR train No. 30 enroute from St. Louis, Missouri, to New York City, which leaves Harrisburg at 6:42 a.m. The through sleeping car is switched onto train No. 30 at Harrisburg, with arrival at North Philadelphia station scheduled for 8:38 a.m. and in New York City at 10:05 a.m. Intermediate stops are made at Lancaster and Paoli.

Train No. 645 operates from Harrisburg to Hagerstown and normally consists of a sealed express and mail car, one coach enroute from Harrisburg to Roanoke, and one Pullman sleeping car enroute from New York City to Roanoke. The sleeper is operated from New York City to Harrisburg on PRR train No. 3, which departs from New York City at 8:45 p.m., E.D.T., and stops at North Philadelphia, Paoli, and Lancaster enroute to Harrisburg with arrival at the latter station scheduled for 12:15 a.m. Coach passengers may also use train No. 3 to Harrisburg from which point train No. 645 is scheduled to depart at 12:40 a.m., with intermediate stops at Carlisle, Chambersburg, and Greencastle enroute to Hagerstown where the train is due to arrive at 3:05 a.m., E.D.T. The cars then continue south to Roanoke as Norfolk and Western Train No. 1, departing from Hagerstown at 2:30 a.m., E.S.T. with arrival in Roanoke scheduled for 9:55 a.m., E.S.T.

The schedule times outlined above are those in effect since April 30, 1961 with the advent of daylight saving time in certain localities served by these trains and update the operation times shown on various exhibits referred to in the testimony.

The route used by the sleeping car between Roanoke and New York City is approximately 506 rail miles in length.

Applicant alleges in its formal petition for the proposed train withdrawals that:

(1) During recent years passenger traffic on the two trains has been consistently light. On the average day, six or seven persons use each train for travel to and from points in Pennsylvania.

(2) The expenses of operating the trains substantially exceed the revenues which the company has derived from this operation. Passenger service on the Cumberland Valley Branch is operated at a loss which is disproportionate to the use made of the trains and to the value of the service to the public. Approval of this application will produce substantial savings to applicant and thereby contribute to the operation of other rail service for which there is a real need.

(3) The territory along the branch is served by numerous other transportation companies and highway routes in competition with applicant's service. Convenient alternate means of travel are available to the passengers now using trains Nos. 638 and 645 and the continued operation of the trains is not required in the public interest.

The record in this proceeding includes protests entered by the following groups:

Commissioners of Cumberland County, Pennsylvania

Council for the Borough of Carlisle, Pennsylvania

Mayor, City of Hagerstown, Maryland

Mayor, City of Front Royal, Virginia

Mayor, City of Berryville, Virginia

Mayor, Luray, Virginia

Chamber of Commerce, Buena Vista, Virginia

Chamber of Commerce, Luray, Virginia

Southern Seminary and Jr. College, Buena Vista, Virginia

Penn Hall School, Chambersburg, Pennsylvania

Railroad Brotherhoods in the State of Pennsylvania

In addition, opposition to the proposed abandonment of service is expressed in letters forwarded to the Commission by executives of numerous industries and corporations having facilities in various localities served by these trains and by many individuals residing in the States of Pennsylvania, Maryland, Virginia, West Virginia, New Jersey, and New York.

The initial hearing was held in Harrisburg on January 16, 1961, and further hearings were held at the same place on February 20 and March 20, 1961. There were 244 pages of transcript. Appearances were entered by counsel in behalf of applicant, by counsel for two individual protestants, the Solicitor for the Borough of Carlisle, and by two individuals in their own behalf. Applicant submitted four exhibits through five witnesses. Protestants intro-

duced testimony from three witnesses but submitted no exhibits. Briefs were filed by applicant and protestants on April 12 and 25, 1961, respectively. At its executive session of May 15, 1961, the Commission approved the admission of a supplemental brief filed by applicant on May 9, 1961.

The record indicates that, in event the instant application for abandonment of service is approved, Norfolk and Western Railroad Company contemplates the withdrawal of the passenger train service presently provided between Waynesboro, Virginia, and Hagerstown, Maryland, by N & W trains Nos. 1 and 2 and proposes to operate through coaches between Roanoke and Washington, D. C., and to operate a through sleeping car between Roanoke and New York City, by interchanging these cars with the Chesapeake and Ohio Railroad Company at Waynesboro, Virginia. It is proposed to operate the sleeping cars from Washington, D. C. to New York City over lines of The Pennsylvania Railroad Company.

The passenger traffic manager of Norfolk and Western Railroad Company offered testimony concerning the fact that Norfolk and Western proposes to interchange the Roanoke-New York Pullman sleeper with Chesapeake and Ohio at Waynesboro, Virginia. He stated that the decision to adopt the alternate routing for this service was made by Norfolk and Western as a result of the filing of the instant application by The Pennsylvania Railroad Company.

A comparison of the schedules presently in effect for the operation via Norfolk and Western and The Pennsylvania Railroad Company, and of the rerouted schedule proposed at the initial hearing shows the following:

Times are shown in Prevailing local time

Present Schedule (Effective April 30, 1961)

	Read Down							*Read Up*	
PRR #3	8:45 pm	DST	Lv.	New York, N.Y.	Ar.			10:05 am	DST
	10:12 pm	"	"	No. Phila., Pa.	"			8:38 am	"
	10:51 pm	"	"	Paoli, Pa.	"			8:10 am	"
	11:38 pm	"	"	Lancaster, Pa.	"			7:23 am	"
	12:15 am	"	Ar.	Harrisburg, Pa.	Lv.	PRR	#30	6:42 am	"
PRR #645	12:40 am	"	Lv.	Harrisburg, Pa.	Ar.			6:20 am	"
	1:14 am	"	Ar.	Carlisle, Pa.	"			5:27 am	"
	2:13 am	"	"	Chambersburg, Pa.	"			4:27 am	"
	2:31 am	"	"	Greencastle, Pa.	"			4:12 am	"
	2:05 am	EST	"	Hagerstown, Md.	Lv.	PRR	#638	2:55 am	EST
N&W #1	2:30 am	"	Lv.	Hagerstown, Md.	Ar.			2:40 am	"
	4:15 am	"	Ar.	Front Royal, Va.	"			12:57 am	"
	4:55 am	"	"	Luray, Va.	"			12:15 am	"
	5:35 am	"	"	Shenandoah, Va.	"			11:50 pm	"
	5:53 am	"	"	Elkton, Va.	"			11:24 pm	"
	6:19 am	"	"	Grottoes, Va.	"			11:00 pm	"
	7:00 am	"	"	Waynesboro, Va.	"			10:35 pm	"
	9:55 am	"	"	Roanoke, Va.	Lv.	N&W	#2	7:50 pm	"

Proposed Schedule (Via Alternate Route)
(Eastern Standard Time).

Read Down				*Read Up.*			
Southbound				*Northbound*			
PRR	#155	5:30 pm	Lv. New York	Ar.			8:00 am
		7:18 pm	Lv. Phila., 30th St.	Ar.			6:12 am
		9:30 pm	Ar. Washington, D. C.	Lv.	PRR	#118	3:50 am
C&O	#3	10:30 pm	Lv. Washington, D. C.	Ar.			3:00 am
		2:52 am	Ar. Waynesboro, Va.	Lv.	C&O	#6	11:08 pm
N&W	#1	6:38 am	Lv. Waynesboro, Va.	Ar.			9:53 pm
		9:20 am	Ar. Roanoke, Va.	Ar.	N&W	#2	7:10 pm

The record does not reveal the schedule to be followed during the summer months when daylight saving time is observed in some of the localities served by the trains involved with the proposed rerouting.

Applicant's Exhibit No. 18 shows the use made of trains Nos. 638 and 645 by revenue passengers between Hagerstown, Maryland, and Harrisburg, Pennsylvania, for the years 1958, 1959, and 1960. Applicant's accounting witness testified this exhibit was prepared from records submitted daily by the train conductors during this three-year period. The daily average number of revenue passengers using each of the trains for each of the three years, together with the three-year average is shown below:

Train No. 638—Hagerstown, Md. to Harrisburg, Pa.

	Coach	*Pullman*	*Total*
1958	11.1	14.8	25.9
1959	10.0	11.8	21.8
1960	9.9	11.7	21.6
3-Year Average	10.3	12.8	23.1

Train No. 645—Harrisburg, Pa. to Hagerstown, Md.

	Coach	*Pullman*	*Total*
1958	11.8	11.5	23.3
1959	11.6	10.5	22.1
1960	10.1	9.9	20.0
3-Year Average	11.2	10.6	21.8

The combined daily average number of passengers, both coach and Pullman classes, using both trains

each month during the three-year period from January 1958 through December 1960, and the average number of passengers handled daily during each year are as follows:

Daily Average Number of Coach and Pullman Revenue Passengers on Trains Nos. 638 and 645

Month	*1958*	*1959*	*1960*
January	52.5	57.2	58.1
February	52.5	46.5	53.7
March	36.5	37.2	52.0
April	41.9	39.9	45.9
May	46.7	46.1	42.6
June	61.3	43.1	37.0
July	46.5	37.1	33.8
August	46.8	34.0	33.3
September	45.9	37.4	15.9
October	49.3	37.2	35.3
November	47.2	48.8	39.2
December	64.0	62.0	50.5
Average Per Day	49.2	43.9	41.6

These statistics, expanded to show the number of revenue passengers using these two trains by week, month and year, indicate as follows:

Revenue Passengers handled on Trains Nos. 638 and 645, based on daily average use figures

	1958	*1959*	*1960*
Per Week	344	307	291
Per Month (30 days)	1,476	1,317	1,248
Per Year	17,958	16,024	15,184

An examination of applicant's Exhibits Nos. 19 and 20, which present a detailed record of the travel on the trains for the seven-day period beginning Sunday, June 19, 1960 through Saturday, June 25, 1960, reveals that of a total of 36 coach passengers carried on Train No. 638 during this week, two traveled entirely within Pennsylvania, one entrained in Pennsylvania for destinations beyond this State and 25 of the passengers detrained at stations located within Pennsylvania. A total of 100 Pullman passengers were handled on Train No. 638 during the same week, none of which boarded the train in Pennsylvania, while 11 of the Pullman passengers detrained in this State.

A total of 55 coach passengers were carried on Train No. 645 during this week in June 1960, 10 of which boarded and detrained within Pennsylvania, 26 boarded the train in Pennsylvania for destinations south of this State and 11 detrained in this State. A total of 69 Pullman passengers were handled on Train No. 645 in the seven-day period, 13 of which boarded the train in Pennsylvania for destinations south of this State. Further examination of these exhibits indicates that 20 passengers of the total of 136 handled on Train No. 638 during the seven-day period would be adversely affected by the removal of this train in that they would have no rail service available. Forty passengers of the total of 124 handled on Train No. 645 in the same period would likewise have no rail service available.

A study of the most recently available passenger count for these trains covers the 12 months beginning July 1, 1959 and ending June 30, 1960, and reveals the daily average number of passengers on Train No.

638 to be 23 and on Train No. 645 to be 22.4. A witness for applicant stated this travel was divided approximately equal between coach and Pullman passengers.

Another witness for applicant testified that the carrier estimates that approximately 24.8 per cent of the passengers presently using trains Nos. 638 and 645 could not avail themselves of the proposed service via Norfolk and Western Railroad lines between Roanoke, Virginia, and Waynesboro, Virginia, thence via Chesapeake and Ohio lines to Washington, D. C. and via Pennsylvania Railroad to New York City.

The general effect of the proposed abandonment of passenger train service is that travel by rail would be unavailable to or from those stations on the 73.3 mile Cumberland Valley Branch of applicant which extends from Harrisburg, Pennsylvania, to Hagerstown, Maryland, and, additionally, no rail service would be available on the 142 mile Norfolk and Western Main Line extending between Hagerstown, Maryland, and Waynesboro, Virginia.

Applicant places emphasis on its allegations that what is involved in this application is a simple rerouting of cars. One of applicant's witnesses testified, however, that approximately 17 per cent of the passengers handled on Train No. 638 and approximately 35 per cent of the passengers carried on Train No. 645 during the so-called "test period" in June, 1960 would be adversely affected by the removal of these trains.

A review of the record as it concerns the alternate means of travel remaining available to the public in

portions of the areas involved indicates that the one daily airplane flight in each direction formerly operated between New York City and Hagerstown, Maryland, by Allegheny Air Lines with intermediate stops at Harrisburg, was discontinued on September 30, 1960, and the air service between Harrisburg and Hagerstown was discontinued as of November 30, 1960.

Eastern Greyhound Lines presently operate through bus service in either direction between Harrisburg and Hagerstown on the following schedules:

Eastern Daylight Time (Effective April 30, 1961)

	Daily	*Daily*	*Daily*	*Friday and Sat.*
Lv. Harrisburg, Pa.	6:45 am	2:30 pm	5:35 pm	8:30 pm
Ar. Carlisle	7:25 am	3:10 pm	6:20 pm	9:10 pm
Ar. Chambersburg	8:17 am	4:08 pm	7:19 pm	10:00 pm
Ar. Greencastle	8:37 am	4:32 pm	7:38 pm	10:20 pm
Ar. Hagerstown, Md.	9:00 am	4:55 pm	8:00 pm	10:40 pm

	Daily except Sun. & Holidays	*Daily*	*Friday and Sat.*	*Daily*
Lv. Hagerstown, Md.	5:35 am	12:30 pm	5:15 pm	8:45 pm
Lv. Greencastle, Pa.	5:56 am	12:53 pm	5:38 pm	9:08 pm
Lv. Chambersburg	6:16 am	1:13 pm	5:58 pm	9:28 pm
Lv. Carlisle	7:15 am	2:05 pm	6:50 pm	10:20 pm
Ar. Harrisburg	8:00 am	2:45 pm	7:30 pm	11:00 pm

Valley Transportation Company provides local bus service in either direction between Harrisburg and Carlisle, a distance of approximately 18 miles, by means of 14 round trips daily. Service is provided from Harrisburg to Carlisle commencing at 5:45 a.m. and continuing at intervals until 9:15 p.m. Service

from Carlisle to Harrisburg is provided at varying intervals from 6:45 a.m. until 10:45 p.m.

The 1960 population figures for the communities located along applicant's Cumberland Valley Branch are as follows:

Harrisburg (City)	78,869
Harrisburg (Metropolitan Area)	239,963
Carlisle (Cumberland County)	16,492
Shippensburg (Cumb. and Franklin Cos.)	6,371
Chambersburg (Franklin County)	17,625
Greencastle (Franklin County)	2,895
Waynesboro, Va.	10,422
Hagerstown, Md.	36,301

A shipping and traffic executive for General Electric Company's Waynesboro, Virginia, plant testified that his employer utilizes trains Nos. 638 and 645 for the shipment of a considerable volume of express. The witness stated he had been unsuccessful in his efforts to obtain from representatives of Railway Express Agency, Incorporated, as well as representatives of the various railroads involved, assurances that the proposed rerouting of the trains via Waynesboro, Virginia, and Washington, D. C. over lines of Chesapeake and Ohio Railroad will provide adequate and equivalent service for express shipments which his employer makes to all parts of the United States. He also testified that General Electric employees use the trains for business travel for approximately 10 to 20 round trips monthly between Waynesboro, Virginia and New York City.

A resident of the Borough of Carlisle, whose place of employment is in Harrisburg, testified that train

No. 645 represents the only means of public transportation available to him, every third week, and stated the removal of this train would necessitate changing his residence.

The Mayor of the City of Hagerstown, Maryland, was represented at the second hearing by the City Engineer of Hagerstown who testified as to the city's formal opposition to the removal of the trains since they represent the only means of transportation between Hagerstown and New York City.

The Solicitor for the Borough of Carlisle appeared at the initial hearing to enter the protest and opposition of the borough to the proposed service abandonment based on the public inconvenience which would result from the discontinuance of the trains.

Applicant's Exhibit No. 21, entitled "Comparison of Operation of Trains Nos. 638 and 645, Hagerstown, Maryland and Harrisburg, Pennsylvania, versus Operation via New York and Washington, D. C.," is presumed to represent a 12-month period, although such fact is not established by the record.

The annual passenger revenues from these trains are shown by this exhibit to be $177,642 and revenues from handling U. S. mail, express and milk are shown to be $24,520, or a total revenue of $202,162.

Crew costs are placed at $42,162, locomotive costs at $46,580, and car rental costs and expenses at $25,-821, or total above-the-rail expenses of $114,563 with resultant net revenues of $87,599.

The contemplated revenues to accrue to applicant from the proposed rerouting of the service are esti-

mated at $148,032, which is predicated upon full retention of those passengers presently travelling by rail between Waynesboro, Virginia, and points south thereof to Roanoke, Virginia, enroute to Philadelphia, Pennsylvania, and New York City, New York, and, additionally, the estimates allow for full retention of the present express revenues accruing to applicant. No expense items for crew or locomotive costs are indicated, the only expenses shown being that charged to car supplies and expenses in the amount of $4,864. Additional Pullman revenues increased the total anticipated revenues to $157,359. Applicant's exhibit, therefore, conveys the information that applicant would possibly benefit by increased annual net revenues of $69,760 in excess of those presently received.

However, analysis of this exhibit shows that the savings will result from two major sources—savings of the crew cost from abolition of jobs and elimination of locomotive repairs and car rental, items for which the savings are not readily demonstrable inasmuch as some railroad will have to provide the cars on the reroute, and locomotive repair charges, except for the type of accounting used here, are not a direct function of the miles traveled.

In addition, Exhibit No. 21 shows that there would be an even greater loss of revenue on the carrier's lines beyond Harrisburg, caused by discontinuance of trains Nos. 638 and 645. While the trains produce passenger revenues of only $60,982 between Harrisburg and Hagerstown, they contribute passenger revenues of $116,660 beyond Harrisburg, so that the proposed rerouting would lessen the carrier's overall revenues by about $50,000. Loss of this additional

revenue between Harrisburg and Philadelphia and New York could conceivably snowball into requests for additional train discontinuances.

A witness for applicant testified that since October 1, 1951, the operation of the Roanoke-New York City Pullman-sleeping cars on trains Nos. 638 and 645 has been continued on the basis of the terms of an agreement entered into between management of The Pennsylvania Railroad Company and of the Norfolk and Western Railroad Company. This agreement provides that The Pennsylvania Railroad Company move the Pullman cars involved over its lines in both directions between Hagerstown, Maryland and New York City, New York, and that any financial deficit incurred by The Pennsylvania Railroad Company in the handling of the cars between Hagerstown, Maryland, and Harrisburg, Pennsylvania, will be absorbed by the Norfolk and Western Railroad Company. The record does not indicate any desire on the part of the Norfolk and Western Railroad Company to disturb the present arrangement.

Applicant's Net Railway Operating Income Statement for the latest year available at the time of the initial hearing shows the following:

1959	
Net Railway Operating Income—Freight	$67,641,227
Net Railway Operating Income—Passenger (Deficit)	$37,673,049
Net Railway Operating Income—Unassignable (Deficit)	$ 133,293
Net Railway Operating Income—Total	$29,834,885

The Passenger Operating Ratio for The Pennsylvania Railroad System in the year 1959 was 109.06. The proposed abandonment of service, affecting an estimated 24.8 per cent of the users of these trains would possibly bring about a slight decrease in this figure.

Applicant anticipates a savings of $42,162, representing the wages of engine and train crews employed in the operation of these trains between Harrisburg and Hagerstown and savings of $20,488 covering the annual car rental fee paid by The Pennsylvania Railroad Company to Norfolk and Western Railroad Company for the use of the N & W coaches on these trains, based on an established rate of 19.1 cents per mile between Harrisburg and Hagerstown and applicant further claims savings of $46,580 representing locomotive costs assigned to the present operation. This latter figure is a questionable saving as related to the proposed abandonment since a large portion of the locomotive costs will continue as a chargeable item in the service to which the particular locomotives are assigned.

Applicant's accounting witness emphasized the fact that the financial information contained in applicant's Exhibit No. 21 are the closest approximations and estimates obtainable from the accounting method followed by applicant. The witness stated that carrier records are not maintained in a way that will develop the actual full savings to be realized, such as the locomotive costs chargeable to the particular engines used in the operation of trains Nos. 638 and 645, but rather the costs shown are those assigned or allocat-

ed to the trains on a prorated locomotive ton-mile basis as developed from system-wide accounts. For the year 1959, applicant had total system locomotive maintenance costs amounting to $32,300,200, charged to 857 diesel electric units, both passenger and freight, of which amount $9,387,983 was allocated to system-wide passenger service on a locomotive-ton-mile basis.

Applicant in its brief alleges the proposed service abandonment will not deprive the public of essential transportation service and points out that both trains carry an average of approximately 16 passengers per week who travel wholly within the State of Pennsylvania. However, it is incumbent upon the Commission to consider all passengers entraining or detraining within Pennsylvania, regardless of origin or destination.

Applicant states that the importance of the carrier realizing the estimated saving of approximately $69,000 far out-weighs the public need for continued operation of these trains and requests the Commission find the continued operation of trains Nos. 638 and 645 is not required by public convenience.

Protestants' brief questions whether applicant should be permitted to discontinue these trains which provide system revenues of $87,599 in excess of the allocated above-the-rail expenses in view of the fact that approximately 24.8 per cent of the present patrons of these trains would be deprived of rail service. Protestants classify the instant application as unique in the respect that the proposed rerouting or alternate service may provide some estimated increased revenues for applicant while, at the same

time, having the effect of seriously inconveniencing a sizable segment of the present patronage of the affected trains.

Applicant, in its supplemental brief, opposes any suggestion that a carrier should not be permitted by regulatory bodies to discontinue trains which operate on a profitable basis and takes exception to the contention of protestants that 24.8 per cent of the patrons of these trains will be seriously inconvenienced and alleging that adequate alternate means of public and private travel are available.

In attempting an evaluation of applicant's testimony relative to revenues and expenses assigned to the operation of these particular trains, both actual and anticipated, there is reason to give consideration to the reality that the accounting procedures and systems presently followed by railroads are, for the most part, tailored to meet Interstate Commerce Commission accounting and reporting requirements which are geared to regulation of carrier earnings evolved from financial stablization and property valuation data. The available unit-cost data and information pertinent to the particular operation appears to be somewhat inadequate.

We must here measure the need for a particular segment of passenger transportation which, in this proceeding, involves the only remaining passenger train service on applicant's 68 mile Cumberland Valley Branch between Harrisburg, Pennsylvania, and the Maryland-Pennsylvania State line.

The adequacy of the accommodations and facilities provided by the alternate bus service available for

those communities which would be deprived of rail service has not been clearly established.

Applicant has failed to substantiate fully the allegations set forth in its petition for this abandonment of service and we are of the opinion that continued maintenance of this service does not presently constitute an undue burden on applicant, in view of the revenues generated for applicant's main line trains by this branch line operation.

In considering this application from the standpoint of demand for service, economy, available alternate or substitute services, or any other yardstick, sufficient reason exists for requiring applicant to maintain both coach and sleeping car accommodations on trains Nos. 638 and 645.

Upon full consideration of the matters and things involved, it is our opinion and we find that the instant application should be denied; Therefore,

It Is Ordered: That the application at A. 87818 of The Pennsylvania Railroad Company for permission to abandon all passenger train service on the Cumberland Valley Branch of its Philadelphia Region by the discontinuance of trains Nos. 638 and 645, between the City of Harrisburg, Dauphin County, and the Pennsylvania-Maryland boundary line, be and is hereby denied.

Pennsylvania Public Utility Commission

(signed) Joseph Sharfsin
Chairman

Attest:

Secretary

APPENDIX VI

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application Docket No. 87818

In re: Application of THE PENNSYLVANIA RAILROAD COMPANY—For approval of the abandonment of all passenger train service on its Cumberland Valley Branch, by the discontinuance of trains Nos. 638 and 645, between the City of Harrisburg, Dauphin County, and the Pennsylvania-Maryland boundary line.

ORDER

By the Commission, July 9, 1962:

This matter comes before us on a rule issued February 20, 1962, upon The Pennsylvania Railroad Company to show cause why it should not comply with our order of August 7, 1961, requiring it to maintain service between the City of Harrisburg and the Pennsylvania-Maryland boundary line. An answer was filed by the Railroad, and hearing was held on April 6, 1962, in Philadelphia, after which briefs were filed by the Railroad and the protestants in the original case.

This case arises from an application filed by The Pennsylvania Railroad Company on November 29, 1960, to abandon the Pennsylvania intrastate portion of the runs of trains Nos. 638 and 645 operating daily between Harrisburg, Pennsylvania, and Hagerstown, Maryland. The application called for abandonment of all passenger train service on its Cumberland Valley Branch between the City of Harrisburg and the Pennsylvania-Maryland boundary line.[1]

Numerous protests were filed to this application for abandonment, and after hearings were held and the case briefed, this Commission by order dated August 7, 1961 denied the application. In our order we made the following findings so far as pertinent herein:

> "We must here measure the need for a particular segment of passenger transportation which, in this proceeding, involves the only remaining passenger train service on applicant's 68 mile Cumberland Valley Branch between Harrisburg, Pennsylvania, and the Maryland-Pennsylvania State line.
>
> "The adequacy of the accommodations and facilities provided by the alternate bus service available for those communities which would be deprived of rail service has not been clearly established.
>
> "Applicant has failed to substantiate fully the allegations set forth in its petition for this abandonment of service and we are of the opinion that continued maintenance of this service does not

[1] This was the Railroad's wording.

presently constitute an undue burden on applicant, in view of the revenues generated for applicant's main line trains by this branch line operation.

"In considering this application from the standpoint of demand for service, economy, available alternate or substitute services, or any other yardstick, sufficient reason exists for requiring applicant to maintain both coach and sleeping car accommodations on trains Nos. 638 and 645.

"Upon full consideration of the matters and things involved, it is our opinion and we find that the instant application should be denied; . . ."

No appeal was taken from this order, which, therefore, became final. The findings made therein are not subject to dispute in this Rule, and the respondent has not attempted to assail the findings made by us against abandonment. Section 1112 of the Public Utility Law, 66 P.S. §1442, provides:

"Section 1112 (66 P.S. §1442). Effect of Commission Action—Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act, the same shall be prima facie evidence of the facts found, and shall remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal to the Superior Court taken as provided in this act."

Our February 20, 1962 Rule to show cause alleged that we had information before us that respondent proposed to discontinue the train service in question

without our permission. The answer of The Pennsylvania Railroad Company, filed with us February 27, 1962, stated that the passenger trains Nos. 638 and 645 had been discontinued February 25, 1962, under the authority of the Interstate Commerce Commission, pursuant to Section 13(a)(1) of the Interstate Commerce Act, 49 U.S.C.A. Section 13(a)(1). The answer further alleged that a notice and supporting data had been filed by the Railroad on January 24, 1962, with the Interstate Commerce Commission to effectuate the discontinuance. The answer further alleged that on February 8, 1962, the Interstate Commerce Commission announced that it would not enter upon an investigation of the proposed discontinuance, and that in view of this, respondent was duly authorized to discontinue its trains, citing STATE OF NEW JERSEY V. UNITED STATES, 168 F. Supp. 324, affirmed 359 U.S. 27.

At the hearing on April 6, 1962, the Railroad appeared by its counsel and gave testimony with reference to the facts alleged in its answer. At that time pertinent exhibits were placed into the record.

From the facts adduced at this hearing we find that The Pennsylvania Railroad Company on January 24, 1962, did file a notice of proposed discontinuance of service with the Interstate Commerce Commission under Section 13 (a)(1) of the Interstate Commerce Act, commonly known as the Transportation Act of 1958, Act of August 12, 1958, 49 U.S.C. §13(a)(1), 49 U.S.C.A. §13(a)(1),* indicating its in-

* Congress passed Section 13(a)(1) and Section 13(a)(2) on August 12, 1958, as an amendment to the Interstate Com-

tention to discontinue the said passenger train service, effective February 25, 1962. The notice of pro-

---

merce Act providing for discontinuance or change of service. These two sections are herewith quoted:

"Sec. 13a [August 12, 1958.] [49 U.S.C. §13a] (1) A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become

posed discontinuance recited that passenger trains Nos. 638 and 645 serve the following stations: Hagers-

---

effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

"(2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this part, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate

town, Maryland; Greencastle, Pennsylvania; Chambersburg, Pennsylvania; Carlisle, Pennsylvania; and Harrisburg, Pennsylvania. The notice went on to recite "that persons desiring to object to the proposed discontinuance should promptly notify the Interstate Commerce Commission at Washington, D. C. of such objection and the reasons therefor before February 11, 1962." Notwithstanding this, the Interstate Commerce Commission decided on February 8, 1962, not to enter upon an investigation of the proposed discontinuance with the result that the company was free to place it into effect.

On February 8, 1962, this Commission mailed to the Interstate Commerce Commission a petition for leave to intervene in the case. On February 13, 1962, this Commission received a notice from the Interstate Commerce Commission of its February 8, 1962 decision, announcing that it would not enter upon an investigation of the proposed discontinuance of service. We note, parenthetically, that since our petition to intervene could not have reached Washington, D.C., until February 9, 1962, which was prior to the February 11 deadline, the Interstate Commerce Commis-

---

operations of such carrier or carriers of upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph."

sion had prematurely decided its position before the full period of time which the Railroad notice had announced. This was all the more unfortunate in light of the subsequent decision of the Interstate Commerce Commission dismissing numerous requests for reconsideration by "Order" dated March 23, 1962, the Commission asserting that the requests for reconsideration were received after the expiration of the 30-day notice period, that the subject trains had been discontinued, and that the Commission was without authority to grant the requested relief. It may be that additional protests were filed on February 9 and February 10, 1962, as was the case with our protest, but the Commission, having already made its decision on February 8, was not moved to rescind its order. While we take exception to the premature decision of the Interstate Commerce Commission in these circumstances, we shall assume that it did consider our protest as well as the others, and that had it seen fit to rescind its order it would have done so between February 11 and February 15, 1962,* during which period it did have the authority to order a suspension.

The issues now before us concern the effect upon our jurisdiction of respondent's application to the Interstate Commerce Commission and of our power to compel respondent to operate the particular trains in question. Our order of August 7, 1961, being unappealed from, has become final, and its findings can-

---

*Notes: This was the last date on which the Interstate Commerce Commission, on its own initiative, was empowered to suspend the proposed discontinuance.

not be questioned herein. Our conclusion that the public convenience and necessity in this Commonwealth require that respondent operate its passenger service between Harrisburg and the Pennsylvania-Maryland border must be accepted in this proceeding as a fact. We are, therefore, limited to the issue of whether the action taken by respondent before the Interstate Commerce Commission has superseded our jurisdiction.

Before analyzing this important issue, we make the following significant observations. The Interstate Commerce Commission issued no order and made no finding that the intrastate service with which we are concerned is a burden on the interstate service. The trains in question going between Harrisburg and Hagerstown make four stops in Pennsylvania and one stop in Maryland. The trains, therefore, have intrastate aspects concerning persons who would be carried only between points in this Commonwealth and interstate aspects as to the persons who would be carried to points between states. Counsel for respondent concedes that the trains do have the dual aspects of interstate and intrastate service. It is also apparent that what this Commission took jurisdiction over was only the intrastate aspects of the service. That we had jurisdiction originally of the intrastate service, there can be little doubt: ALABAMA PUBLIC SERVICE COMMISSION V. THE SOUTHERN RAILWAY CO., 341 U.S. 341, 71 S. Ct. 762 (1951); MISSOURI PACIFIC RAILWAY CO. V. KANSAS EX REL. TAYLOR, 216 U.S. 262, 54 L. Ed. 472 (1910); PALMER V. MASSACHUSETTS, 308 U.S. 79, 60 S. Ct. 34, 84 L. Ed. 93 (1939).

Particularly impressive on this point is the case of MISSOURI PACIFIC RAILWAY CO V. KANSAS EX REL. TAYLOR, 216 U.S. 262, 54 L. Ed. 472 (1910), wherein the following were the facts. The State Board of Railroad Commissioners of Kansas directed the Missouri Pacific Railway to put a passenger train in operation between Madison, Kansas, and the Missouri-Kansas state line. The Railroad had previously operated a train with dual passenger and freight service between these points. On complaint by the protestants the state commission ordered the Railroad to operate a separate regular passenger train. The particular line in question went from Madison, Kansas to Monteith Junction, Missouri, at which there were certain connections with other lines. The trains then continued to operate three miles distant to the Butler Station where terminal facilities exist. The greater volume of the passenger travel left the branch at Falls Point between Madison and the state line. There are no terminal facilities at the state line so that the Railroad, in order to comply, had to continue its train into Missouri notwithstanding the order applied only to service to the state line. In that case the Railroad, among its other contentions, argued that the Commerce Clause invalidated the state order and it, therefore, was not obliged to obey the state order.

In a learned decision by Mr. Justice White the Supreme Court of the United States stated, in effect, that the order of the state was within its authority, was not an unreasonable burden upon interstate commerce, and the Railroad had to obey it. The Court very pertinently stated:

"The contention that a burden was imposed upon interstate commerce by causing the train to stop at the state line, where there were no terminal facilities, but in a disguised form reiterates the complaint which we have already disposed of, that the order, because of the direction to stop at the state line, was so arbitrary and unreasonable as to be void. The order cannot be said to be an unreasonable exertion of authority, because the power manifested was made operative to the limit of the right to do so. Besides, the proposition erroneously assumes that the effect of the order is to direct the stoppage at the state line of an interstate train, when, in fact, the order does not deal with an interstate train, or put any burden upon such train, but simply requires the operating within the state of a local train, the duty to operate which arises from a charter obligation. It is said that, as the state line may be but a mere cornfield, and great expense must result to the railway from establishing necessary terminal facilities in such a place, it must follow that the road, in order to avoid the useless expenses, must operate the passenger service directed by the order, not only to the state line, but 20 miles beyond, to Butler, on the Joplin line, where terminal facilities exist. From these assumptions, it is insisted, that the order must be construed according to its necessary effect, and therefore must be treated as imposing a direct burden upon interstate commerce by compelling the operation of the passenger train, not only within the state of Kansas, but beyond its borders. But under the

hypothesis upon which the contention rests, the operation of the train to Butler would be at the mere election of the corporation, and, besides, even if the performance of the duty of furnishing adequate local facilities in some respect affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed. Atlantic Coast Line R. Co. v. Wharton, 207 U.S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121."

The fact is that the Pennsylvania Railroad recognized this proposition by seeking our approval of its application on its own initiative. After our adverse order, the Railroad applied to the Interstate Commerce Commission for permission to abandon the service between Harrisburg and Hagerstown, which service comes within the definition contained in Section 13(a)(1), since it involves a point in one state to a point in another state. The Interstate Commerce Commission was within its authority in failing to suspend, and no action could be brought by us by way of mandamus or otherwise to require the Interstate Commerce Commission to order a suspension: STATE OF NEW JERSEY V. UNITED STATES, 168 F. Supp. 324, affirmed, 359 U.S. 27.

We do not here challenge the right of the Railroad to discontinue service between points in Pennsylvania and the point in Maryland. The case in question, however, concerns service only between points in this State. It might be argued that a need for service may not exist between Harrisburg, Pennsylvania, and Hagerstown, Maryland, which is what the Interstate

Commerce Commission was concerned with, while there does exist a need for service between Harrisburg and Greencastle, Pennsylvania. However, upon studying the language of Section 13(a)(1) which permits a discontinuance despite "the laws or constitution of any state, or the decision or order of, or the pendency, of any proceeding before, any court or state authority to the contrary notwithstanding", and after examining the legislative history, we find that state control over the intrastate aspects was intended to be ousted, and the Railroad, therefore, was empowered to take off the entire train, see 104 Cong. Rec. 10852, 10853, 10842. While there is a doctrine that a statute should be construed to avoid doubtful constitutional questions, we are impelled to the conclusion that Section 13(a)(1) of the Federal Transportation Act of 1958 does intend a supersession of all state law even as to the intrastate aspects of any given interstate train. The Supreme Court has declared that controlling importance is to be given to House and Senate committee reports explicitly revealing Congressional purpose, and statutes must be given effect in accordance with the purpose clearly manifested by Congress: COMMISSIONER OF INTERNAL REVENUE V. BILDER, 82 S. Ct. 881 (1962).

However, what is of deep concern to us in this proceeding is the fact that the Railroad determines for itself that it desires to abandon service, and that determination becomes the basis for superseding the jurisdiction of this Commission without an opportunity for us to contest this at a proper hearing with evidence disproving the contentions of the Railroad. We would have no hesitation in regarding our order of

August 7, 1961, as properly superseded if the Interstate Commerce Commission had held hearings, and made an independent finding that our order constituted an undue burden on interstate commerce. We would be satisfied even with a determination by the Interstate Commerce Commission that the proposed abandonment by the respondent Railroad was in the public interest since that, of itself, would constitute a finding that the intrastate aspects were interfering with interstate commerce. But we have no such finding in this case. It is very possible in any number of situations that the intrastate movement of an interstate train may be profitable, may be urgently needed, may be vital to the state's interests in a given set of circumstances, and that no bona fide reason may exist for the Railroad's attempt to abandon the intrastate service.

We are thus confronted with a question as to the constitutionality of Section 13(a)(1) so far as it purports to supersede a state order of the kind that has been issued in this case without affording the state a hearing or without even making a finding that there is an undue burden between the intrastate aspects and the interstate aspects.

Our order which denied respondent's request for discontinuance was based upon full hearings, proper evidence, examination, and cross-examination. Citizens, public officials, business executives, union representatives, and various organizations were afforded an opportunity to appear before us and give testimony as to their position. But in the matter at hand, the Interstate Commerce Commission afforded no

hearing, provided no opportunity for the presentation of evidence, permitted no testing of the Railroad's contentions, made no findings and issued no order, but by inaction permitted the Railroad to make its own judgment. This procedure eliminates the adjudicatory process, and appears to us to violate the due process requirements of our basic written law. On this question of supersession, as evidenced by our unappealed from order of August 7, 1961, the State interests have been by-passed completely, its orders rendered a nullity, and its voice extinguished—all by ex parte action of the petitioning railroad.

In CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY COMPANY V. STATE OF MINNESOTA, 134 U.S. 418, the shoe was on the other foot. There, the Railroad and Warehouse Commission of the State of Minnesota upon an informal investigation, without a formal hearing, found that the rate of the Railroad for transporting milk from Owatonna and Faribault to St. Paul and Minneapolis was three cents per gallon and that such charges were unequal and unreasonable, in violation of the state law, and that a rate of two and one-half cents per gallon was an equal and reasonable rate for such services. The Railroad refused to comply with the Commission's order and the Attorney General brought mandamus. The State Supreme Court upheld the Commission and declared that the rates fixed by the State agency were "final and conclusive as to what are lawful or equal and reasonable charges" and the Railroad in a compliance proceeding cannot traverse the findings.

The Railroad took its case to the United States Supreme Court contending it had been deprived of

due process. The United States Supreme Court agreed. In its opinion it said, in part:

". . . In other words, although the Railroad Company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the Commission, if it chooses to establish rates that are unequal and unreasonable.

"This being the construction of the Statute by which we are bound in considering the present case, we are of opinion that, so construed it conflicts with the Constitution of the United States in the particulars complained of by the Railroad Company. It deprives the Company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a Railroad Commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

"Under section 8 of the Statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the Commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the Commission is required to do is, on

the filing with it by the railroad company of copies of its schedules of charges, to 'find' that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the Commission 'shall declare to be equal and reasonable,' and, to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the Commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the Commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the Commission, the Company appeared before it by its agent, and the Commission investigated the rates charged by the Company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at.

". . . If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their

invested capital, the company is deprived of the equal protection of the laws. . . ."

We are thus faced in the instant case with the supersession of a validly made state order, where no hearing is provided for, no opportunity to introduce witnesses before the Interstate Commerce Commission is given, and "in fact, nothing which has the semblance of due process of law" appears of record.

This grant of almost absolute authority to the Railroad by the 1958 Act bears the same infirmity as all unconstitutional delegations of power to private parties. E.g., in CARTER ET AL. V. CARTER COAL CO. ET AL., 298 U.S. 238, at p. 311, Congress authorized a majority of producers and miners of coal in a given district to fix minimum wages for all in the district. The Supreme Court said, in part: "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . . The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. (cases cited)."

In SEATTLE TRUST CO. V. ROBERGE, 278 U.S. 116, 121, 122, a Seattle zoning law prohibited the maintenance of a home for the aged poor unless two-thirds of the property owners within 400 feet consented. This act was held to be in violation of the require-

ments of due process. The Supreme Court said in part:

> "The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. Yick Wo v. Hopkins, 118 U.S. 356, 366, 368. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. Eubank v. Richmond, 226 U.S. 137, 143, Browning v. Hooper, 269 U.S. 396."

We do not believe that Congress has the right to authorize a Railroad, in effect to determine ex parte whether it will abandon intrastate service, notwithstanding a State order to the contrary, without a finding to be made by the Interstate Commerce Commission that such intrastate service constitutes an undue burden on interstate commerce and without the rudiments of due process.

The Transportation Act of 1958 is clear with respect to the proposition that the question as to whether intrastate aspects constitute a burden to interstate transportation, must be determined on the facts of each individual case. In fact, under Section 13(a)(1) the Interstate Commerce Commission, if it holds a hearing and finds that the operation or service "is required by public convenience and necessity and *Will Not Unduly Burden* interstate or foreign commerce, the Commission may by order require the continuance

or restoration of operation or service of such train or ferry, *in Whole or in Part,* for a period not to exceed one year from the date of such order." Congress, therefore, clearly recognized that in certain cases the intrastate service may not unduly burden the interstate service.

It is highly significant that Congress in Section 13(a)(2) *requires* the Interstate Commerce Commission to make a finding of an undue burden *after hearing* before it can order an intrastate operation superseded or displaced. Why should a different rule apply to the intrastate service of an interstate train?

Reference to the cases dealing with intrastate rates is instructive. In SIMPSON V. SHEPARD (MINNESOTA RATE CASES), 230 U.S. 352, the railroads challenged the right of Minnesota to regulate intrastate rates on the ground that it imposed a burden on interstate commerce. The Supreme Court noted (p. 420) that "In the present case there has been no finding by the Interstate Commerce Commission of unjust discrimination violative of the act; and no action of that body is before us for review." The Supreme Court held that in the absence of action by the Interstate Commerce Commission the state still had jurisdiction to regulate rates of intrastate transportation. Several years later in HOUSTON, EAST & WEST TEXAS R. CO. V. U. S. (SHREVEPORT CASE), 234 U.S. 342, the Supreme Court ruled that the Interstate Commerce Commission had the authority to control intrastate rates after holding a hearing and finding that such intrastate rates constituted an undue burden on interstate commerce. In the *Shreveport* case the Supreme Court stated at p. 353: "Con-

gress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. *This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such,** but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions or interstate carriers may thereby be controlled." The Court went on to say:

> "Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier, and subject to the authority of the states, or of the agencies created by the states. This was the question recently decided by this court in the Minnesota Rate Cases . . ."

This view has been recently reaffirmed in the PUBLIC SERVICE COMMISSION OF UTAH V. U. S., 356 U.S. 421, 425, wherein the Supreme Court stated:

> "Intrastate transportation is primarily the concern of the State. Federal power exists in this area *only when* intrastate tariffs are so low that an undue or unreasonable advantage, preference, or prejudice is created as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other, or when those rates cast an undue burden on interstate commerce. Proof of such must meet 'a high stand-

* Our emphasis.

ard of certainty,' Illinois Central R.R. Co. v. P.U.C., 1918, 245 U.S. 493, 510, 38 S. Ct. 170, 176, 62 L. Ed. 425; before a state rate can be nullified, the justification for the exercise of federal power must 'clearly appear.' State of Florida v. U. S., 1931, 282 U.S. 194, 211-212, 51 S. Ct. 119, 123-124, 75 L. Ed. 291. The Court pointed out in State of North Carolina v. U. S., 1945, 325 U.S. 507, 511, 65 S. Ct. 1260, 1263, 89 L. Ed. 1760, that the findings supporting such an order of the Interstate Commerce Commission must encompass each of the elements *essential* to federal power. Thereafter, in King v. U. S., supra, we stressed the necessity of substantial evidence to support the findings, although we held it unnecessary 'to establish for each item in each freight rate a fully developed rate case.' 344 U.S. at page 275, 73 S. Ct. at page 270." (Emphasis added.)

From a review of these decisions it seems to us that Congress, in order to displace state action over intrastate transportation is required to provide for a hearing, and for findings that the state's regulation constitutes a burden upon interstate commerce. We have no doubt about the plenary authority of Congress to

The difficulty which we find in this case is that the result was achieved (the abandonment of these trains) not as a result of any action by the regulatory body but that Congress has reposed in the individual rail-

preempt the field. What we quarrel with is the procedure Congress has employed, and the grant of arbitrary and ex parte power to a private citizen, the railroad, to determine the quantity and extent of regulation it will tolerate from a sovereign state.

roads the right to supersede state authority. Clearly, Congress should have made provision for the simple fundamental of affording the interested states the opportunity of at least presenting their case at a hearing. Congress has not seen fit to do so, an omission which we consider fatal. We have not found any authority which would support the proposition that state jurisdiction can be thus superseded by the unilateral action of a private carrier. It is farfetched to say that the Interstate Commerce Commission, by failing to act, adopts the Railroad's contention that the state order is an undue burden on interstate commerce. We believe that the balance of power as between the federal and state governments, embodied within the federal constitution, requires something more.

The case of STATE OF NEW JERSEY V. U. S., 168 F. Supp. 324, affirmed, 359 U.S. 27, did not present the question here raised. It ruled that so far as an interstate discontinuance was concerned, the action was constitutional. That case involved a ferry plying between the State of New Jersey and the State of New York. There was no intrastate service involved in any manner whatsoever. The Interstate Commerce Commission refused to suspend the discontinuance of the interstate ferry, and the Supreme Court held that the State of New Jersey could not require the Interstate Commerce Commission to act differently. The case did not involve the propriety of superseding a state order affecting admittedly intrastate commerce by unilateral action of the Railroad itself.

We, therefore, hold that the Transportation Act of 1958, which provides that state orders lawfully regu-

lating intrastate commerce are superseded by the unilateral action of private railroads, is in violation of the due process clause of the Constitution of the United States so far as the statute's methods of controlling and superseding state regulation of intrastate commerce, are concerned; Therefore,

It Is Ordered: That the rule to show cause be made absolute, and that The Pennsylvania Railroad Company restore and continue to maintain service as required in our order of August 7, 1961.

Pennsylvania Public Utility Commission

(signed) Joseph Sharfsin
Chairman

Attest:

Secretary

APPENDIX VII

INTERSTATE COMMERCE COMMISSION
Washington, D. C.

Finance Docket No. 21936

Pennsylvania Railroad Company Discontinuance of Service Between Harrisburg, Pa., and Hagerstown, Md.

NOTICE

Upon consideration of a notice and supporting data filed January 24, 1962, by The Pennsylvania Railroad Company under section 13a(1) of the Interstate Commerce Act proposing discontinuance effective February 25, 1962, of the service of its passenger trains Nos. 638 and 645 between Harrisburg, Pa., and Hagerstown, Md., serving certain intermediate stations, and of protests received in opposition thereto, the Commission, Division 3, on February 8, 1962, concluded not to enter upon an investigation of the proposed discontinuance of service.

Harold D. McCoy
Secretary

February 8, 1962

APPENDIX VIII

ORDER

Service Date

March 29, 1962

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, Acting as an Appellate Division, held at its office in Washington, D. C., on the 23rd day of March, A.D. 1962.

Finance Docket No. 21936

Pennsylvania Railroad Company Discontinuance of Service Between Harrisburg, Pa., and Hagerstown, Md.

Upon consideration of the notice filed by The Pennsylvania Railroad Company on January 24, 1962, under section 13a(1) of the Interstate Commerce Act, as amended, that effective February 25, 1962, said carrier will discontinue service of its passenger trains Nos. 638 and 645 between Harrisburg, Pa., and Hagerstown, Md.; the decision of the Commission, Division 3, announced by notice dated February 8, 1962, not to enter upon an investigation of the proposed discontinuance; and the telegrams dated March 8,

1962, from Congressman Francis E. Walter, and dated March 9, 1962, from George W. Kerstetter, Clyde Rife, Peter Ordanoff, H. R. Meridith, E. W. Croyle, James L. Connors and Eugene Schuler, Reeves Bros., and others requesting reconsideration of the aforementioned decision of the Commission, Division 3; and

It appearing, That section 13a(1) of the Interstate Commerce Act authorizes this Commission to institute an investigation of a proposed discontinuance thereunder only within the 30 days' notice period prior to the proposed effective date;

It further appearing, That the requests for reconsideration of the aforementioned decision were received after expiration of the 30 days' notice period, that the subject trains have been discontinued, and that this Commission is, therefore, without authority to grant the requested relief:

It is ordered, That the requests for reconsideration be, and they are hereby, dismissed.

By the Commission, Division 3, Acting as an Appellate Division.

Harold D. McCoy
Secretary

(Seal)

APPENDIX IX

SECTION 13a OF INTERSTATE COMMERCE ACT

DISCONTINUANCE OR CHANGE OF CERTAIN OPERATIONS OR SERVICES

Sec. 13a. (1) A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of,

or the pendency of any proceeding before any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the purposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after

such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

(2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this part, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the

Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph.

APPENDIX X

1. ACT OF CONGRESS, 28 U.S.C. §1738

§1738. State and Territorial statutes and judicial proceedings; full faith and credit. The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, *records* and *judicial proceedings* or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions *as they have by law or usage in the courts of such State,* Territory or Possession from which they are taken.